CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1928 29

No. 8106 62

JOHN BAIZLEY IRON WORKS AND THE OCEAN ACCIDENT AND GUARANTEE CORPORATION, LIMITED, APPELLANTS,

vs.

ABRAHAM SPAN

APPEAL FROM THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

FILED APRIL 4, 1929

(34,119)

(34,119)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 810

JOHN BAIZLEY IRON WORKS AND THE OCEAN ACCIDENT AND GUARANTEE CORPORATION, LIMITED, APPELLANTS,

vs.

ABRAHAM SPAN

APPEAL FROM THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

INDEX

	Original	Print
Proceedings in supreme court of Pennsylvania	1	1
Order allowing appeal	1	1
Citation and service (omitted in printing)	3	
Proceedings before the Workmen's Compensation Board	6	2
Petition	6	2
Testimony of Abraham Span	9	4
Opinion, Bosler, Referee	15	8
Opinion, Morrison, Commissioner	19	10
Opinion, Finletter, J., court of common pleas No. 4	24	13
Opinion, Linn., J., superior court	30	16
Agreed statement of facts	34	19
Opinion, Moschzisker, C. J., and judgment	36	20
Petition for appeal, assignment of errors, and prayer for reversal	56	37
Opinion, Moschzisker, C. J., and judgment (omitted in printing)	61	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 7, 1929

	Original	Print
Petition for reargument.....(omitted in printing)..	81	
Bond on appeal.....(omitted in printing)..	83	
Stipulation and præcipe for transcript of record.....	85	40
Clerk's certificate.....(omitted in printing)..	87	
Judge's certificate to clerk.....(" " ")..	88	
Clerk's certificate to judge.....(" " ")..	88	
Statement of points to be relied upon and stipulation to print entire record.....	89	42

[fols. a & 1]

IN SUPREME COURT OF PENNSYLVANIA

JOHN BAIZLEY IRON WORKS and THE OCEAN ACCIDENT AND GUARANTEE CORPORATION, LIMITED, Appellants,

vs.

ABRAHAM SPAN

ORDER ALLOWING APPEAL—Filed March 6, 1929

The appellants in the above-entitled suit, and each of them, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above-entitled suit by the Supreme Court of the State of Pennsylvania, on the 7th day of January 1929, and from each and every part thereof, and having presented and filed their petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided;

It is now here ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Supreme Court of the State of Pennsylvania in the above-entitled case, as provided by law, and it is further ordered that the Prothonotary of the Supreme Court of the State of Pennsylvania shall prepare a certified transcript of the record, proceedings and judgment in this [fol. 2] cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within thirty days of this date.

And it is further ordered that security for costs on appeal and to act as a supersedeas be filed in the sum of five hundred dollars.

Dated March 6th, 1929.

R. von Moschzisker, Chief Justice of the Supreme Court of Pennsylvania.

[File endorsement omitted.]

[fols. 3-5] Citation, in usual form, showing service on Samuel Moyerman, filed Mar. 7, 1929, omitted in printing.

[fol. 6] BEFORE WORKMEN'S COMPENSATION BOARD

Claim Petition No. 25210

ABRAHAM SPAN, Claimant,

v.

JOHN BAIZLEY IRON WORKS, Defendant

PETITION

To the Workmen's Compensation Board of Pennsylvania:

The claimant respectfully alleges the following facts:

1. By whom were you employed at the time of the accident? John Baizley Iron Works, 514 S. Delaware Ave., Phila., Pa.

2. Where did the accident happen? On ship "Baldhill," on Delaware River, Phila., Pa. (Pier 98 South).

3. When did the accident happen? January 13, 1926, about 4 p. m.

4. What kind of work were you doing at the time of the accident? Painting the angle irons on board ship.

5. What was the nature of the injury and how was it caused? Both eyes affected by sparks. One of the workmen for the John Baizley Iron Works was cutting iron with an acetylene torch flew down to where I was some distance away from the torch, and got into my eyes, making them so sore that I was unable to do any work the next day, [fol. 7] and they have continually gotten worse.

6. Did you receive medical, surgical, or hospital services? Yes, medical services the Ocean Accident & Guar. Corp., Ltd., 416 Walnut St., sent me to see Dr. Clarence P. Franklin, U. S. Veterans Bureau, Kann Bldg., 20th and Arch Sts., and I afterwards went to see Dr. J. J. Simpkins, N. E. Cor. 18th and Chestnut Sts., Phila., Pa.

7. Did you request the defendant to furnish these services? Yes. Were they furnished? Only by first physician. If not, what sums did you spend for them? $24 already.

8. To what extent did your injury prevent you from working? Absolutely altogether. For how long? I am still prevented, and I cannot see any possibility of going back to work. Have you fully recovered? No. Have you partially recovered, and if so to what extent? Eyes seem to be getting worse. When did you resume work? Have not been able to resume work of any kind.

9. What were your weekly wages at time of accident? $30 and if overtime $35.

What was the business of your employer? Iron works. What was your occupation? Blacksmith helper.

10. When did you serve notice of your injury upon your employer? The next day to the employer, who referred him to the Ins. Co. and he had a number of interviews with [fol. 8] the Insurance Co. before seeing counsel.

11. What other facts are there which you believe important? ——.

12. State total amount of compensation claimed? Full compensation until injury is relieved.

Wherefore the claimant asks that your Honorable Board shall make an award that the defendant shall pay to him such compensation as may be due him under the above alleged facts.

Abraham (his x mark) Span, Claimant, 513 Reed St., Phila., Pa.

Witness: James A. Lynd.

Subscribed and sworn to before me this 2 day of March, 1926, at Phila., Pa. James A. Lynd. My commission expires on the 7th day of January, 1927. (Seal.)

[fol. 9] BEFORE WORKMEN'S COMPENSATION BOARD

ABRAHAM SPAN, 513 Reed Street, Philadelphia, Pennsylvania, being duly sworn according to law, testified as follows:

Direct examination.

By Mr. Weaver:

Q. Who did you work for prior to January 13th?
A. John Baizley Iron Works.
Q. How long had you worked for them?
A. All winter and this winter I worked not all winter but three or four days a week.
Q. Were you working for them on January 13th?
A. Yes.
Q. Where?
A. Down at Bald Hill.
Q. Were there a lot of other people there working with you?
A. Yes.
Q. What particular work were you doing on that day?
A. I was painting the iron in the engine room.
Q. Tell the Referee what happened to you on January 13th?
A. We came in the morning to work.
Q. Just before this accident occurred to you what were you doing?
A. We worked in the boiler shop.
Q. On this particular day you were working on this ship?
A. Yes.
Q. There were a lot of other people with you?
A. Yes.
Q. What were they doing?
A. I was painting the iron and the other people were fixing the floor.
[fol. 10] Q. What was the man doing that had the acetylene torch?
A. I was painting the iron and the burner come over by the name of Harry.
Q. Who was he employed by?
A. John Baizley Iron works.

Q. What happened?

A. I called him over to burn up the iron I was from him like to this where I was painting and I called him over to burn the iron on the other side, as soon as he put the torch to the iron why the flame caught me in the eye, that was about ten minutes of five, the foreman had gone up to get ready to go home, I didn't know what to do, I went up on the deck, I said to the fellow from the machine shop, "where is Harry," he said he just went off the ship, I called him back and I said, "Harry, I got a terrible accident, I will not be here tomorrow," he said, "what is the matter with you," I said, "you see me don't you," and a boy run to the Doctor right away, that was quitting time and the office was closed and I went home, all the time the eyes were getting red and swelled up, my wife said, what is the matter with your eyes, I started to get pain and I went to the drug store and he gave me some washing stuff but it did not help me, he said you better go to the hospital.

Q. Is that the card they gave you on the day that you went to the hospital (handing claimant a card)?

[fol. 11] A. Yes, they told me that they could not give me treatment but they will give me a couple of drops, but they don't handle compensation cases, they told me to go back to the people that I worked for and I went to John Baizley's with the bandage on.

Q. Who did you see at the Iron Works and what did you say to them?

A. I went from the hospital to Baizley's to tell them that I was hurt, I went in a little store near the shop, them people knowed me, I went there to get a pair of gloves, the woman said, "what is the matter with your eyes," I told her and then I told the bookkeeper, he said the only thing we can do is to make out the report and sent it to 416 Walnut and I took the report and gave it to Miss Fisher and she sent me to Doctor Franklin he told me the same thing that they told me at the Wills Eye Hospital, he said I should go the Insurance Company and see what they say, I went to them but the handed me some kind of paper I should sign up, I said, "nothing doing."

Q. Can you read?

A. No.

Q. Can you write?

A. No, they said it was al- right to make a cross.
Q. Did they read the paper to you?
A. No.
Q. Did they offer you money to sign it?
[fol. 12] A. Yes.
Q. How much?
A. They tell me, we will give you $36.00, I said, "you could give me $30,000 and I will not sign it, I said I don't know how my eyes will come out."
Q. That was on the 14th of January?
A. Yes.

By the Referee:

Q. Who did treat you?
A. Doctor Simpkins.
Q. That is your own Doctor?
A. Yes.
Q. How many times did you see Doctor Simpkins?
A. I can't remember axactly, probably two weeks.
Q. How much did you pay him?
A. About $3.00 a visit, for a couple of times I did not pay him nothing.

By Mr. Weaver:

Q. You went to the Company doctor until they stopped you?
A. Yes.
Q Then you had to go to Doctor Simpkins?
A. Yes.

By Mr. Weaver: I have receipts from Doctor Simpkins for March 8th, 10th, 16th, 18th and 20th all for $3.00 per visit.

[fol. 13] Q. Were you able to continue the service of Doctor Franklin continuously?
A. No, I did not take anything, they said they wanted me to go to him again and I did.
Q. When was this, was it after you saw Doctor Simpkins?
A. I went to Doctor Simpkins after they said they wanted me to go to Doctor Franklin again.

Q. Did someone come out to your house and tell you to go to Doctor Franklin?

A. Yes.

Q. Have you been able to do any work since this accident?

A. No.

Q. What is the condition of your eyes, do you try to see, do you try to get around?

A. I have to go with my wife.

Q. She leads you?

A. Yes.

Q. What was your salary?

A. $35.00 per week.

Q. Have you been able to earn anything since the 13th of January?

A. No.

Q. Do you feel that you could do anything at all?

A. Maybe I could sell something whereby I could make a living.

Q. If you could get some business in the house?

A. Yes.

[fol. 14] Cross-examination.

By Mr. Dixie:

Q. Where were you working at the time of your injury?

A. John Baizley Iron Works.

Q. Where?

A. On a ship.

Q. On board a ship?

A. Yes.

Q. Below the deck?

A. In the engine room.

By Mr. Dixie: "Mr. Referee, I question the authority of this Court on this case, coming under the Maritime Act, he was working on ship board and the ship was commissioned in Commerce, being repaired."

By Mr. Weaver: "This boat was tied up against the bank in the Delaware River."

By the Referee: "What was the ship doing here?"

By Mr. Dixie. "She was being repaired at Pier 98 South Wharves."

[fol. 15] BEFORE WORKMEN'S COMPENSATION BOARD

OPINION OF THE REFEREE

(a) Findings of Fact

From the testimony taken in this case and the undenied statements in the claim petition, your Referee finds the following facts:

1. That on January 13, 1926, Abraham Span, the claimant, was in the employ of the John Baizley Iron Works, the defendant, as a blacksmith's helper.

2. That on January 13, 1926, neither the claimant nor the defendant had filed with the Workmen's Compensation Bureau, nor served upon the other, notice of their rejection of Article III of the Workmen's Compensation Act of 1915 and the amendments thereto.

3. That on January 13, 1926, and for some time previous thereto the claimant received an average weekly wage of $30.00.

4. That on January 13, 1926, while in the course of his employment with the defendant on the ship Bald Hill, when painting angle irons, some sparks from an acetylene torch that was being used by a fellow employe entered both eyes [fol. 16] of the claimant, burning the cornea, of which the defendant had due notice; that prior to January 13, 1926, the Bald Hill steamed to Philadelphia to have certain necessary repairs made and was tied up to Pier 98 South in the Delaware River; that on January 13, 1926, the Bald Hill was out of commerce and was laid up for repairs; that the claimant was examined by Dr. Charles P. Franklin for the defendant and on January 14, 1926, he was treated at the Wills Eye Hospital; that on January 19, 1926, after the defendant had refused treatment, the claimant went under the care of Dr. J. J. Simpkins; that upon examination by Dr. Simpkins it was found that there was an ulcer in the cornea of the right eye resulting in a nebula over the cornea of this eye; that there was also a marked bulbar conjunctivitis in both eyes, but the vision was such on March 18, 1926, that he was able to return to work; that the claimant was treated by Dr. Simpkins on thirteen occasions from January 19, 1926, to

February 4, 1926, for which services the Doctor has rendered a bill in the sum of $43.00, no part of which has been paid either by the claimant or the defendant; that the treatments given by Dr. Simpkins subsequent to February 4, 1926, have been paid by the claimant; that as a result of the accident, the claimant was disabled from January 13, 1926, [fol. 17] to March 18, 1926, at which time he was able to return to work.

5. That on January 13, 1926, the Ocean Accident & Guarantee Corporation, Ltd., was the compensation insurance carrier of the defendant and they have agreed to pay for the defendant to the claimant any compensation that may be found to be due arising out of these proceedings.

(b) Conclusions of Law

1. That both parties were bound by the provisions of Article III of the Workmen's Compensation Act of 1915 and the amendments thereto.

2. That the claimant, having met with an accidental injury such as contemplated by the Workmen's Compensation Act of 1915 and the amendments thereto while in the course of his employment with the defendant, is entitled to compensation.

(c) Award

Compensation is awarded, and the Ocean Accident & Guarantee Corporation, Ltd., insurer of defendant, is directed to pay to Abraham Span, claimant, sixty per cent (60%) of the maximum weekly wage of twenty dollars ($20.00) or twelve dollars ($12.00) per week, from January [fol. 18] 23, 1926, to March 18, 1926, a period of seven (7) weeks and five (5) days, or the sum of ninety-four dollars ($94.00).

To Dr. J. J. Simpkins, the sum of forty-three dollars ($43.00) for the propert and reasonable medical services rendered the claimant during the first thirty days following disability, making a total award of one hundred thirty-seven dollars ($137.00).

C. W. Bosler, Referee, First District.

E.

Phila., Penna., June 2, 1926.

2—810

[fol. 19] BEFORE WORKMEN'S COMPENSATION BOARD

[Title omitted]

OPINION

MORRISON, Commissioner:

The facts in this case are simple. Abraham Span, an employe of the John Baizley Iron Works, was injured while painting angle irons on board the ship Bald Hill, tied to a pier, in the Delaware River, for repairs.

Webster's International Dictionary has this definition:

"Admiralty jurisprudence has cognizance of maritime contracts and torts, collisions at sea, cases of prize in war, etc., and, in America, admiralty jurisdiction is extended to such matters arising out of the navigation of any of the public waters."

Benedict's Admiralty defines mariners as persons employed on board ships and vessels, during voyage, to assist in their navigation and preservation, or to promote the purpose of the voyage.

Hughes on Admiralty, Section 6, says:

"Every one who is regularly attached to the ship, and contributes to her successful handling, is a seaman."

[fol. 20] Section 3, Act of March 3, 1878, Chapter 156, 18 Stat. L., 485, declares:

"The term 'seaman' wherever employed in legislation relating to the marine hospital service, shall be held to include any person employed on board in the care, preservation or navigation of any vessel, or in the service, on board, of those engaged in such care, preservation or navigation."

The word "seaman" is defined in 35 Cyc. 1178 to be "one whose occupation is to assist in the management of ships at sea; a mariner; a sailor." This authority, after enumerating typical inclusive occupations, excludes lightermen, masters, servants of masters, musicians, physicians, draughtsmen and performers in a show on board a vessel. While in Federal case No. 14,136, it was held that one who

tendered services contributing to the preservation of the vessel, was a seaman, the trend of the decisions is to confine maritime law to seamen and sailors and persons regularly engaged in navigation in the usual and common sense interpretation of that term.

Analagous to the case at bar is the ruling in Bradley v. Bolles, Abbot, Adm. 569, Parsons on Admiralty, wherein it was held that a workman hired to scrape the bottom of a vessel, preparatory to her being coppered, cannot sue in [fol. 21] admiralty.

Directly ruling the case at bar is the decision of the U. S. Supreme Court in Grant Smith-Porter Ship Company v. Herman F. Rhode (66 L. ed. U. S. Supreme Court, page 172). Rhode was employed as a carpenter by the defendant, a shipbuilding company, and was injured while working on a partially completed vessel after it had been launched in navigable waters in the State of Oregon. The Circuit Court of Appeals certified the following questions to the United States Supreme Court:

(1) "Is there jurisdiction in admiralty because the alleged tort occurred on navigable waters?"

(2) "Is libellant entitled because of his injury to proceed in admiralty against respondent for the damages suffered?"

The Supreme Court held that while (1) "the general admiralty jurisdiction extends to a proceeding to recover damages resulting from a tort committed on a vessel in process of construction when lying on navigable waters within a state," nevertheless (2) "in the circumstances stated, the exclusive features of the Oregon Workmen's Compensation Act would apply and abrogate the right to recover damages in an admiralty court which otherwise would exist."

The Court held that the employment (that of carpenter) is essentially non-maritime in character which is important [fol. 22] in its bearing on this case and similar cases arising in the administration of the workmen's compensation law. The Oregon compensation act is of the elective class, such as Pennsylvania's where the parties are presumed to have accepted it in the absence of expressed rejection. In

the Rhode case as here, neither party had made such rejection. The Oregon act also provides for contribution by both parties to a fund out of which compensation was to be paid and both parties had contributed to this fund but, in the main, the case is on all fours with the case at bar.

The Supreme Court expressly stated its conclusion was in harmony with the Jensen case, 244 U. S. 205, for, "in each of them the employment or contract was maritime in nature and the rights and liabilities of the parties were prescribed by general rules of maritime law essential to its proper harmony and uniformity. Here the parties contracted with reference to the State statute; their rights and liabilities had no direct relation to navigation, and the application of the local law cannot materially affect any rules of the sea, whose uniformity is essential."

The case of Raine v. Jobson, 3 W. C. C., 135, is expressive of the courts of Great Britain, where admiralty jurisprudence is of immense importance. Here it was held that, so [fol. 23] far as concerns a man working on a ship, if the ship is in a dock, the dock being a factory, the ship is in a factory, and therefore a man working on the ship is working in a factory. This was declared as ruling in the case of Bartell v. Gray & Company, 85 L. T. 658, the circumstances of the latter being identical with the case at bar; to-wit, a workman injured while painting a ship lying at a wharf for repairs. The claimant was declared within the provisions of the workmen's compensation law.

The appeal is dismissed and the findings of fact, conclusions of law and award are hereby sustained.

John L. Morrison, Commissioner.

Concurred in by Chairman Houck and Commissioner Fleitz April 2, 1927.

[fol. 24] IN COURT OF COMMON PLEAS, No. 4, MARCH TERM, 1927

No. 10143

ABRAHAM SPAN

vs.

JOHN BAIZLEY IRON WORKS

OPINION

FINLETTER, J.:

The claimant was employed by the John Baizley Iron Works. While painting angle irons on the ship Bald Hill, sparks from an acetylene torch, that was being used by a fellow employe, entered both eyes, and, burning the cornea, destroyed the sight.

The ship was brought to the defendant's works, and tied up to a pier in the Delaware River, to permit the making of certain repairs.

The Referee found that the ship was "out of commerce" and awarded compensation. The Workmen's Compensation Board confirmed the award.

Exceptions were taken on behalf of the defendant, on the ground that the Compensation Board is without jurisdiction, because the vessel was engaged in commerce, and therefore subject to admiralty jurisdiction (exclusively).

The mere fact that the instrumentality in question may be put to maritime use, does not oust the jurisdiction of [fol. 25] the state. It is the character of the work in which employer and employe are engaged that is the criterion.

The distinction, which rules this case, is drawn by the Chief Justice in Linway v. Pennsylvania Company, 268 Pa. 491, where he says, at page 495:

"The United States Supreme Court's decisions seem to distinguish between accidents happening to one while working on, or with, things which are in actual common use as instrumentalities of both interstate and intrastate commerce (see Waina v. Pennsylvania Company, 251 Pa. 213; Pedersen v. D. L. & W. R. Co., 229 U. S. 146), and those occurring to persons while employed or working on

things then being put in position for such common use in the future (see Harrington Case, 241 U. S. 177; Raymond v. C. & C. R. R., 243 U. S. 43; N. Y. C. R. R. v. White, 243 U. S. 188). As already indicated, we think the latter class of authorities must be accepted as our guide in the present instance."

We gather from this that the test is, was the work done in the actual use in commerce of the instrumentality or was it in making the tool? Applied to the case at bar was the claimant employed in sailing the ship or in building it, or rebuilding it, or in making substantial repairs, not mere incidents to the voyage?

[fol. 26] In the case above cited the claimant was engaged in filling oil tanks, from which trains, in use in both classes of commerce, where to draw their supply. In the Harrington case the employe was at work filling coal bins for similar joint use. In the Pedersen case the claimant was engaged in the maintenance of tracks actually in use in interstate commerce. In the Raymond and White cases the employe was engaged in new construction. In the first case the claimant was held to be engaged in the commerce for which the line was intended. In the latter two his employment was regarded as local.

A vessel is not under exclusive maritime jurisdiction until she is finished and in commission. (Grant-Smith Co. v. Rohde, 66 L. ed. U. S. S. C., page 172.) Until then she is simply a structure, so much timber and steel, subject to local law, like any other tangible personal property. A contract for building a ship is not a mar-time contract. (Peoples Co. v. Beers, 20 How. 393; Roach v. Chapman, 22 How. 129.) And it would seem that she is in the same situation when withdrawn from commerce for reconstruction. (Raine v. Jobson & Co., 85 Law Times, 141; Lord Chancellor Halsbury) where a workman was killed while repairing a ship that had been drydocked for cleaning and repairs. See also Bartell v. Gray & Co., 85 Law Times, [fol. 27] 658, where the work in hand was painting a ship which was lying at a wharf, in a dock, and undergoing repairs. The "dock" in the first case, and the "ship" in the second, were held to be "factories" ("premises" under our Statute) within the meaning of the Compensation Stat-

ute. The Lord Chancellor in the first case "agreed" that the Compensation Statute did not intend "to deal with the relation between ship owners and sailors when engaged in their ordinary occupation of sailing upon the sea, or bring them within the statute at all." * * * "But" (he said) "it seems to me an extraordinary extension of the immunity * * * to suppose that because the accident happened in or upon a ship therefore it is to be excluded from the operation of the Act of Parliament generally."

We cannot guess that the repairs in process in the case before us were simply those incidental to a voyage, or were merely the necessary upkeep of vessel while in commercial use. For all the evidence discloses she may never have been upon a voyage at all, she may never have been completed. Or, on the other hand, she may have been after long service taken out of commission and brought to the defendant's workshop for reconstruction. In other words, there is nothing to show that the vessel was in actual use in maritime commerce. Indeed there is no testimony that the ship had ever been so engaged, except the idea that may be [fol. 28] conveyed by the fact that she was a ship, and the statement that she was undergoing repairs. No evidence was offered by the defendant that throws any light upon this subject, and the plaintiff's proofs show simply that the vessel was being "repaired."

"Brought in for repairs" is a very indefinite phrase in its bearing upon the case. It would include everything from the casual repairs made during a voyage by the ship's carpenter, which would be but an incident to the voyage, and governed by maritime law, to a taking of the ship out of commerce for general overhauling, amounting to a rebuilding, as to which the parties would be governed by the same rules as those applying to the original building. And, between those extremes, might be a limited amount of adjustment of the ship to receive a particular cargo, as in the case of Doey v. Howland Co., 224 N. Y., 30.

The work was being done in Pennsylvania, and should be governed by the laws of this State, until something is shown to bring it within another jurisdiction. The burden is on the defendant, which asserts that the vessel was engaged in commerce, to prove it. There is no inference to

be drawn from the mere fact that the structure in question is a ship (Raine v. Jobson & Co., Supra). In this state of the evidence the finding of the Referee, which is binding [fol. 29] upon us, that the ship was not "in commerce" is in complete accordance with the proofs. He could not have found otherwise.

The cases (Southern Pacific Co. v. Jensen, 244 U. S. 205; and S. I. C. v. Nordenhalt, 259 U. S. 263) of stevedores engaged in the unloading of vessels are not significant. The unloading of a cargo is obviously as much a part of the voyage, as the loading and the journey itself.

In Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, cited by the defendant, the employe was a "bargeman doing work of a maritime nature." This case throws no light upon the subject under discussion.

For these reasons we are of opinion that the appeal should be dismissed.

[fol. 30] In Superior Court of Pennsylvania, October Term, 1927

No. 388

Abraham Span

v.

Accident and Guarantee Corporation, Insurance Carrier, Appellant

Appeal from Final Judgment of Court of Common Pleas No. 4 of Philadelphia County, as of March Term, 1927, No. 10143, Affirming Award of Workmen's Compensation Board

Opinion—Filed March 2, 1928

Linn, J.:

This controver-y is between an insurance company and a workman to whom the insurer stood as employer pursuant to the workmen's compensation act and supplements. The workman, Span, was employed as a blacksmith's helper by Baizley Iron Works, engaged in repairing the steamship

Bald Hill berthed alongside Pier 98 South, Delaware River, Philadelphia. While painting angle irons in the ship, sparks from the torch of another workman flew into Span's eyes and injured them. He claimed under the Workmen's Compensation Act 1915 P. L. 736 and received an award; it was affirmed by the compensation board and by the common pleas, which entered judgment against the employer's insurance carried. It appeals and presents a single contention,—that the court lacked jurisdiction of the subject—that the judgment is in conflict with the federal rule requiring uniformity in the admiralty and maritime law. [fol. 31] We pass what is said in the briefs concerning the finding of the referee that the ship was "out of commerce." While a contract to construct a new ship is not maritime (Thames Co. v. Francis McDonald, 254 U. S. 242) and repairing an existing ship is (New Bedford v. Purdy, 258 U. S. 96), we shall consider this as a case of mending, not making a ship, and therefore maritime in character: Robins Dry Dock v. Dahl, 266 U. S. 449).

The compensation law creates a system of elective compensation, article 3, sections 301, etc., 1915 P. L. 738. The related act of June 2, 1915 P. L. 769, sec. 1, requires that the insurance carrier agree to be responsible directly to the employe for payment of compensation, and the supplement of June 26, 1919, P. L. 642, section 401, article IV, P. L. 659, defines employer as including the insurer. The insurer may be made a party to the suit: Levan v. Rwy. Co. 279 Pa. 381. The judgment in this case against the insurer is in accord with the statute. No judgment was entered against the employer whose name in the title to this appeal is surplusage.

It is now definitely settled that for some maritime torts, state compensation laws may be enforced without encroaching on the admiralty; the test is—will such enforcement "materially affect any rules of the sea whose uniformity is essential?"[1] It has been held that the exercise of the

[1] For general discussion of the subject,—see The Common Law and The Law of the Sea, 36 Har. Law Rev. 777; Admiralty Jurisdiction of Late Years 37 Ib. 529; Effect of Federal Admiralty Jurisdiction on Workmen's Compensation Acts 35 Ib. 743, Compensation for Stevedores 37 Ib. 478; Uniformity in the Maritime Law 37 Ib. 1114; A Memorandum Decision 40 Ib. 485; Edgar F. Fell; Recent Problems in Admiralty Jurisdiction.

right to elect that employment shall be subject to a state compensation statute, and the consequent enforcement of the election, do not interfere materially with the uniformity of the admiralty: Miller's Underwriters v. Braud, 270 U. S. 59. In that case, it appeared that a diver died from failure of air supply while submerged and employed in sawing off timbers of an abandoned set of ways that obstructed navigation. The decision was that though the [fol. 32] general admiralty jurisdiction would extend to such maritime tort, the parties had elected to be governed by the provisions of the state compensation act and not by the maritime law. It was said that the subject was of "mere local concern and its regulation by the state will work no material prejudice to any characteristic feature of the general maritime law. The act prescribes the only remedy; its exclusive features abrogate the right to resort to the admiralty court which otherwise would exist," 270 U. S. p. 64, 65. In State Industrial Board of State of New York vs. Terry & Tench Co., Inc., et al., 273 U. S. 639, a judgment of the state court (240 N. Y. 292) refusing relief under the state compensation act was reversed without discussion, on the authority of Miller's Underwriters v. Braud. The claimant in that case sustained maritime injury, having been injured while standing on a floating raft in navigable waters, and the state statute enforced was compulsory. It would seem clear that if the parties may choose compensation under the state law or the remedy in admiralty, the waiver of the right in admiralty by choosing compensation results in less interference than if the compensation act were compulsory. "Here," as was said in Grant Smith Porter v. Rhode, 257 U. S. 469, 477, "the parties contracted with reference to the state statute; their rights and liabilities had no direct relation to navigation, and he application of the local law cannot materially affect any rules of the sea whose uniformity is essential." The compensation statute of Alabama was enforced in Rosengrant v. Harvard, 211 Ala. 605, 213 Ala. 202, for a tort committed on navigable waters (though the state court described the tort as non-maritime) and the judgment was affirmed in a memorandum opinion: 273 U. S. 664. See also Southern Realty Co. v. Stubbs (Tex. Civ. App.) 199 S. W. 343, Lumberman's Assoc. v. Adcock (Texas) 244 S.

W. 645, Southern Surety Co. v. Crawford (Texas) 274 S. W. 280, (certiorari refused, 270 U. S. 655), Southern Casualty v. Lindberg, 18 Fed. (2nd) 453 (certiorari refused 47 Sup. Ct. 769), Bockhap v. Transit Co., N. J. 117 Atl. 624, Toland's case (Mass.) 155 N. E. 602, and Messel v. Foundation Co., 274 U. S. 427.

Judgment affirmed.

Judge Gawthrop dissents.

[fol. 33] [File endorsement omitted]

[fol. 34] In Supreme Court of Pennsylvania, Eastern District, January Term, 1928

No. 259

Abraham Span

vs.

John Baizley Iron Works and The Ocean Accident & Guarantee Co., Insurance Carrier, Appellants

Agreed Statement of Facts—Filed Nov. 27, 1928

It is hereby agreed by and between Charles A. Wolfe, Esq., attorney for appellant and Samuel Moyerman, Esq., attorney for appellee, that the following statement of facts shall be substituted for all of the evidence produced at the hearing before the referee in the above matter and shall be printed in the record on appeal in lieu thereof.

The claimant, Abraham Span, was at the time of the injuries in question, on January 13, 1926, a resident of Philadelphia and employed at Philadelphia by the defendant, John Baizley Iron Works. The defendant was engaged in performing certain repairs to the steamship "Bald Hill," at Philadelphia, including inter alia, the painting of the engine room and repairs to the floor of the engine room, The said vessel had prior thereto steamed to Philadelphia for necessary repairs, and at the time of the alleged accident was tied up to Pier 98 South in the Delaware River. [fol. 35] The claimant, in the course of his aforesaid em-

ployment by the defendant, was painting angle irons in the engine room of the vessel. Sparks from an acetylene torch being used by a fellow employe working near claimant, entered the claimant's eyes and caused the injuries resulting in the alleged disability of the claimant.

Chas. A. Wolfe, Attorney for Appellant. Samuel Moyerman, Attorney for Appellee.

[File endorsement omitted.]

[fol. 36] In Supreme Court of Pennsylvania

[Title omitted]

Opinion and Judgment—Filed January 7, 1929

Moschzisker, C. J.:

Abraham Span claimed under the Pennsylvania workmen's compensation law, Act of June 2, 1915, P. L. 736, as amended by the Act of June 26, 1919, P. L. 642, for an accidental injury which happened to him on January 13, 1926; he obtained an award, which was approved by the compensation board, affirme dby the court of common pleas, and, on appeal, by the Superior Court; the case is before us on appeal by defendants from the judgment of the last mentioned tribunal.

For purposes of the present appeal, the parties have agreed upon a statement of facts under Rule 56 of this court, which provides that they "may substitute an agreed statement of facts for all or any part of the evidence, and print it in lieu thereof." This statement is as follows: "The claimant, Abraham Span, was at the time of the injuries in question, on January 13, 1926, a resident of Philadelphia and employed at Philadelphia by the defendant, John Baizley Iron Works. The defendant was engaged in performing certain repairs to the steamship Bald Hill, at Philadelphia, including, inter alia, the painting of the engine room and repairs to the floor of the engine room. The said vessel had prior thereto steamed to Philadelphia for necessary repairs, and at the time of the alleged acci-

dent was tied up to Pier 98 South in the Delaware River. The claimant, in the course of his aforesaid employment by the defendant, was painting angle irons in the engine room of the vessel. Sparks from an acetylene torch, being used [fol. 37] by a fellow employe working near claimant, entered the claimant's eyes and caused the injuries resulting in the alleged disability of the claimant." It will be noticed that there is nothing here to show that the scope of Span's general employment contemplated maritime work nor that his injury resulted from a tortious act on the part of his employer or any one else.

The above recital of facts covers all the findings of the compensatioon authorities except a statement by the referee that the boat on which Span met his injuries was at the time "out of commerce and laid up for repairs." Appellants have no fault to find with the statement that the boat was laid up for repairs, but say correctly: "The referee's statement that the vessel was out of commerce is in itself inconsistent with the finding that the vessel 'had steamed to Philadelphia to have certain repairs made.'" Under the circumstances here shown, the ship was not, in a legal sense, out of commerce so as to deprive admiralty of its general jurisdiction in the premises: The Robert W. Parsons, 191 U. S. 17; The Steamship Jefferson, 215 U. S. 130, 141-2-3; Clyde Steamship Co. v. Walker, 244 U. S. 255, 256-7; Gonsalves v. Morse, 266 U. S. 171, 172.

The principal question involved is, can this claimant take advantage of our state compensation law, or is his claim cognizable exclusively under the maritime law

In a rather extensive research for the correct answer to the above point, we have particularly studied those opinions of the Supreme Court of the United States, from Southern Pacific Co. v. Jensen, 244 U. S. 205, to Northern Coal & Dock Co. v. Strand (filed on December 10, 1928), which pass upon questions concerning injured workers, whose labor was to some degree associated with shipping, but who were not actual members of a ship's crew,—that is, whose activities were not of a nature to make them constantly subject to maritime law; for, it seems to us, in such [fol. 38] opinions must be found the principles that control the present case. We shall mention all and discuss most of them during the course of this opinion,

While, possibly, some of the authorities which we intend to consider are not strictly within either of the classes about to be named, the cases, speaking broadly, fall into two general groups: (1) those involving injuries to stevedores and others whose occupation directly depended on navigation or commerce (this group we shall call "stevedore cases"), and (2) those involving injuries to workers, such as mechanics, whose occupation did not necessarily depend on navigation or commerce, but who, when injured, were making repairs to ships in navigable waters (this group we shall call "repair cases"). The latter class will be taken up first.

In Great Lakes Dredge & Dock Co. v. Kierejewski, 261 U. S. 479, the injured man having died, the question was, could there be a recovery under the maritime law, as supplemented by a local statute giving a right to recover in death cases, when that right did not exist in admiralty? Claimant's husband, a boilermaker, was killed while repairing a scow in navigable waters, through the negligence of the Dredge & Dock Co., his employer. His widow recovered damages in a district court, judgment was entered in her favor, and the employer appealed to the United States Supreme Court. In affirming, the Supreme Court said that Kierejewski was killed "while performing maritime service to a completed vessel afloat * * * upon navigable waters, as the result of a tort there committed"; and that "the rules of the maritime law, supplemented by the local death statute, applied and fixed the legal rights and liabilities of the parties." Thus, the local law was allowed application to the extent indicated.

The next case, Gonzales v. Morse Dry Dock & Repair [fol. 39] Co., 266 U. S. 171, also came to the Supreme Court on appeal from a judgment of a federal district court, entered in an admiralty proceeding. Gonsalves, while working for the defendant dock company, making repairs on board a ship in a floating dock on navigable waters, was injured "through the explosion of a blau torch" which the employer negligently permitted to be out of repair. The court below, apparently viewing the facts as presenting a land case, refused relief on the ground that it had no jurisdiction. The Supreme Court reversed, holding that "repairs to a vessel while in ordinary dry-dock were not made

on land"; that claimant's injury was sustained through a tort "committed and effective on navigable waters," and therefore admiralty had jurisdiction. So far as the report of the case shows, there was no question of the work which Gonsalves was doing at the time of his injury bearing direct relation to navigation, or, as here, of the maritime law being affected by a local workmen's compensation act.

Robins Dry Dock & Repair Co. v. Dahl, 266 U. S. 449, came to the Supreme Court of the United States on appeal from a judgment of a state court of New York, entered in a common-law action to recover damages for personal injuries, received by Dahl in the course of his employment with the Dry Dock Co., caused by the breaking down of " a plank scaffold on which he was * * * standing," while engaged in "repair work" on a steamer, belonging to his employer, "lying in navigable waters." The complaint was that his employer failed to furnish him with a safe place to work. A judgment in favor of the injured man was reversed because the jury had been instructed that, in deciding whether the employer was negligent, it might consider the provisions of a local statute regulating the construction of scaffolds. The Supreme Court said (p. 457): "The alleged tort was maritime, suffered by one doing repair work on board a completed vessel [in navigable [fol. 40] waters.] The matter was not of mere local concern * * * but had direct relation to navigation and commerce * * *. The rights and liabilities of the parties arose out of and depended upon the general maritime law and could not be enlarged or impaired by the state statute."

In the last of the four repair cases, Messel v. Foundation Company, 274 U. S. 427, plaintiff sued in a state court of Louisiana to recover damages for personal injuries suffered while in the employ of defendant company, which was engaged in shipbuilding and ship-repairing. At the time of the accident, claimant was engaged in the work of adding to the height of a smokestack on board one of defendant's ships, when steam, negligently allowed to escape, seriously injurd him. Messel claimed to recover under a certain article of the civil code of Louisiana, and also as an alternative, under the workmen's compensation act of that State, if it could constitutionally apply. The state court held that

neither of these remedies was available to plaintiff. On appeal, the Supreme Court of the United States reversed and held that, though, on the facts involved, the workmen's compensation law of Louisiana could have no application, yet claimant might sue under the state civil code, and that such suit would be governed by principles applicable to the admiralty law, written and unwritten, of the United States; in short, that, under the circumstances, the admiralty law of the United States might be enforced by a civil suit in the courts of Louisiana.

The general nature of the case at bar brings it within the repair group but, as we proceed, it will be seen that this case differs, in certain more or less material particulars, from those previously decided by the United States Supreme Court.

For the present, it is enough to note that the record now before us does not show any contract of general employment between plaintiff and defendant Iron Works, nor suggest that Span was originally engaged on, in or about ships. Apparently he was a land man, under a land con- [fol. 41] tract of employment, who happened to be injured on a ship while doing work of a nature which had no direct relation to navigation or commerce; whereas, in each of the four cases just reviewed, the injured person was employed by a concern directly and apparently exclusively, engaged in maritime work, and the records there involved indicate or strongly suggest that his original employment contemplated work having some direct relation to navigation or commerce.

In one of the four cases above mentioned, and in some others to be mentioned, when determining whether the injured person's rights could be affected by a local statute, the terms of his contract of general employment were considered: see Southern Pacific Co. v. Jensen, 244 U. S. 205, 217; Grant Smith-Porter Co. v. Rohde, 257 U. S. 469, 475-6; Industrial Commission v. Nordenholt Co., 259 U. S. 263, 276; Great Lakes, etc., Co. v. Kierejewski, supra, 480; Alaska Packer's Assn. v. Industrial, etc., Commission, 276 U. S. 467; Northern, etc., Co. v. Strand (not yet reported). The terms of such a contract do not, however, control the question of whether work being done at a particular moment was of a maritime nature; on that point, the test is,

Was the employer against whom the claim for damages is made engaged in a maritime undertaking at the time of the injury? If he was thus engaged, so was the injured employe (Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 61-2; though that fact, we think the federal authorities indicate, does not of itself bar the latter from claiming the benefits of a local law.

The four decisions of the Supreme Court of the United States discussed above, and other federal cases, denote that repairing a completed vessel lying in navigable waters may be accounted part of the maintenance of the boat and hence a maritime act (see also Trainer v. The Boat Superior, 1 Gilpin's Reports, 514, 516); but the mere fact that, at the moment of his injury, one was engaged in performing [fol. 42] services which might properly be classed as "maritime in character" is not the final test as to exclusiveness of maritime jurisdiction to adjudge rights growing out of the situation; Sultan Ry. etc., Co. v. Dept. of Labor, 72 L. Ed. 559, 560. We shall show, later on (after first explaining our understanding of what we have called the Stevedore Cases, supra), that recent opinions written by the United States Supreme Court lay down additional tests. These are: (1) Had the injured person's activities at the time of the accident "direct relation to navigation or commerce"? (2) Under the circumstances of the particular case, would "the regulation of the rights, obligations and consequent liabilities of the parties, as between themselves, by a local rule, * * * necessarily work material prejudice to any characteristic feature of the general maritime law or interfere with [its] proper harmony or uniformity"? As we understand the relevant opinions, if a reasonable view of the facts involved in any particular case warrants a negative answer to the above questions, admiralty will yield to local law, even though such law be evidenced by a workmen's compensation statute.

In reading the cases of injuries to stevedores, longshoremen, and others doing approximately like work, it must be constantly remembered that men following such occupations are looked upon by the federal authorities as largely entitled to the protection afforded seamen (Atlantic Trans-

port Co. v. Imbrovek, 234 U. S. 52, 62; International Stevedoring Co. v. Haverty, 272 U. S. 50, 52), attached to the boat on which they labor, and, therefore, when they work on a ship in navigable waters, their labor is accounted as bearing direct relation to navigation and commerce. As previously noted, the decisions in such cases may be classed by themselves; they do not govern a controversy like the one now before us, involving injury to a mechanic (not a seaman, nor otherwise directly connected with navigation) employed by a third party (who, so far as the record shows, was not the owner or operator of the ship on which the [fol. 43] accident occurred, nor generally engaged in a business dependant upon maritime work), where plaintiff was injured, while painting an interior room of a vessel on navigable waters, by sparks flying from an acetylene torch in the hands of another employe of the third party (the latter employe also, so far as the record shows, not being a seaman nor otherwise directly connected with navigation).

While none of the decisions already mentioned, nor any of those we are about to discuss, rule the case before us, yet the opinions in many of them contain, as will be shown, enlightening judicial utterances, in which, we think, may be found the key to the present situation.

Southern Pacific Co. v. Jensen, 244 U. S. 205, was a stevedore case. It was there decided that one injured while following such a maritime occupation, upon a ship in navigable waters, was not entitled to the benefits of a state workmen's compensation act; that his remedy was exclusively in admiralty. This decision has been closely followed in all subsequent stevedore and like cases where the injury happened on board a ship in navigable waters. See Clyde S. S. Co. v. Walker, 244 U. S. 255, 257; Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 155, 157-9; Washington v. Dawson, 264 U. S. 219, 227-8; Northern Coal & Dock Co. v. Strand (not yet reported). On the other hand, where men working at such employments are injured on shore, even though they may be performing work in connection with the unloading of a ship, the local law applies rather than the maritime. See State Industrial Commission v. Nordenholt, 259 U. S. 263; Smith v. Taylor, 276 U. S. 179.

In State Industrial Commission v. Nordenholt, supra (a

longshoreman case where the injury happened on a dock, and the state compensation law was allowed to apply), the United States Supreme Court, in the course of its opinion, said (pp. 272-3), in a general way, that, "When an employe working on board a vessel in navigable waters, sustains [fol. 44] personal injuries and seeks damages from the employer, * * * the liability of the employer must be determined under the maritime law * * * The liability of the employer for damages on account of injuries received on shipboard by an employe under a maritime contract is matter within the admiralty jurisdiction." At first glance this judicial utterance may appear to mean that, whenever an employee of any kind, doing any sort of work on board a vessel in navigable waters, sustains injuries, the employer's liability will be determined under maritime law; but the last part of the quotation and the rule that everything said in an opinion must be read in the light of the facts in the case, show, we think, the court's meaning to be that, whereever an employe, working at a maritime pursuit, or, in the words of the opinion, under a "maritime contract"—that is, at some work which has direct relation to navigation and commerce—suffers an injury on shipboard, the maritime law applies; not that whenever any employe, doing any kind of work under any sort of a contract, is injured on shipboard the maritime law must apply, simply because the injury occurred there.

Again, in Smith v. Taylor, 276 U. S. 179, another stevedore case where the injury occurred on a wharf—an extension of the land—the Supreme Court, in the course of its opinion states: "If the cause of action arose upon the river [a navigable stream], the rights of the parties are controlled by maritime law." Here again the passage in question must be read in connection with the facts of the particular case; and, when so read, it does not mean that every cause of action which arises upon navigable water is controlled by maritime law. Though it does seem to mean that injuries happening on land, even where the injured stevedore is engaged in what might be accounted maritime work, under a maritime contract, may be accounted local [fol. 45] and subject to the land law rather than maritime law.

As previously noted, there is a doctrine, announced in recent opinions of the United States Supreme Court, to this effect: That "state statutes providing compensation" for injured employees may "be treated as amending or modifying the maritime law in cases where they concern purely local matters and occasion no interference with the uniformity of such law in its international and interstate relations": Northern Coal & Dock Co. v. Strand, supra, and authorities there cited. In Alaska Packers' Assn. v. Industrial Commission, 276 U. S. 467, the Supreme Court said that, "Whether in any possible view the circumstances disclose a cause within the admiralty jurisdiction," was not the question for determination. Equally, in a case like the present it is not necessary to determine whether admiralty could have jurisdiction, but only whether or not the Pennsylvania act can apply notwithstanding general admiralty jurisdiction; or, in other words, whether plaintiff, when injured, was "engaged in any work so directly connected with navigation and commerce that to permit the rights of the parties to be controlled by local law would interfere with the essential uniformity of the general maritime law": Alaska Case, supra. The point, however, is to find some logical method of classifying cases so as to determine which of them "concern purely local matters and occasion no interference with the uniformity of maritime law," and which, on the other hand, concern more than purely local matters.

In Chelentis v. Luckenback S. S. Co., 247 U. S. 372, a fireman, injured on board a ship at sea, instituted a common law action in a state court to recover "full indemnity for damages sustained." The case was removed to a United States district court because of diverse citizenship. It was there decided that no such recovery could be had, and in affirming, on appeal, the United States Supreme Court said (p. 382):

"Under the doctrine approved in Southern Pacific Co. v. [fol. 46] Jensen, no state has power to abolish the well recognized maritime rule concerning the measure of recovery and substitute therefor the full indemnity rule of the common law. Such a substitution would distinctly and definitely change or add to the settled maritime law and would

be destructive of the uniformity and consistency at which the Constitution aimed."

The case mentioned at the head of the immediately preceding paragraph and others following immediately hereafter are inserted at this stage of the opinion because they contain expressed views showing when the application of a state law will be allowed in the field of admiraty, as not occasioning any undue interference with the uniformity of the maritime law, and when it will not; but in reading the Chelentis Case it must be remembered that, unlike the one at bar, it is not one of those dealing with an injury to a laborer on shipboard, who was unconnected with the boat in any permanent sense and who, at the time of his injury, was engaged in work only remotely relating to navigation or commerce; there the claimant was attached to the boat on which he was hurt, his contract or empoyment was strictly maritime, and he was injured when performing services of a nature relating directly to navigation; so, under all the authorities, he was confined to admiralty relief.

In Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, Stewart, who was employed as a bargeman and "doing work of a [strict] maritime nature," fell into the Hudson River and was drowned. His widow received an award under the local workmen's compensation law, which award was approved by the state courts, on the theory that a recently passed Act of Congress, "to save to claimants the rights and remedies under the workmen's compensation law of any state," had in effect overruled the Jensen Case. The United States Supreme Court reversed, remanding the record for further proceedings not inconsistent with its opinion. It [fol. 47] held the act in question to be unconstitutional, saying, at page 163, that Congress undertook to permit application generally of "workmen's compensation laws of the several states to injuries within the admiralty * * * jurisdiction, and to save such statutes from the objections pointed out by Southern Pacific Co. v. Jensen"; that this was beyond their power under the Constitution, adding at page 164, "To say that, because Congress could have enacted a compensation act applicable to maritime injuries, it could authorize the states to do so as they might desire,

is false reasoning. Such an authorization would inevitably destroy the harmony and uniformity which the Constitution not only contemplated but actually established. * * * Congress cannot transfer its legislative power to the States."

Western Fuel Co. v. Garcia, 257 U. S. 233, came to the Supreme Court of the United States from a federal circuit court. The case involved a claim for the death of a stevedore killed while doing maritime work in San Francisco Bay. The Supreme Court said: "Where death * * * results from a maritime tort committed on navigable waters within a state whose statutes give a right of action on account of death by wrongful act [the general maritime law giving no such right], the admiralty courts will entertain a libel in personam for the damages sustained by those to whom such right is given. The subject is maritime *and local* in character [the italics are ours], and the specified modification of, or supplement to, the rule applied in admiralty courts, when following the common law, will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law." Here, even in a stevedore case, the local law was allowed application to the extent indicated.

In Grant Smith-Porter Co. v. Rohde, 257 U. S. 469, appealed from a federal circuit court, claimant was injured [fol. 48] while working as a carpenter, constructing a bulkhead enclosing tanks on a ship docked in navigable waters. He was employed by a shipbuilding company engaged in constructing steam vessels for the United States government. The vessel on which he was working when hurt had been launched; and, though the Supreme Court states in an early part of its opinion that the boat was "substantially completed," yet, later, it treats it as "an incompleted structure." The State of Oregon, where the accident happened, had a workmen's compensation law to which, generally speaking, the employer and employe in this case were subject. The questions submitted to the Supreme Court of the United States for decision were (p. 475):

"1. Is there jurisdiction in admiralty because the alleged tort occurred on navigable waters?

2. Is libellant entitled because of his injury to proceed in admiralty against respondent for the damages suffered?"

The thought in mind evidently was that if such jurisdiction existed, it would be exclusive. While answering the above questions in the affirmative, the court held that, since the ship involved was an incompleted structure (under the federal law, contracts for constructing ships, even though seagoing, are accounted nonmaritime: People v. Beers, 61 U. S. 393, 402; Roach v. Chapman, 63 U. S. 129, 132; Thames v. The Schooner Francis McDonald, 254 U. S. 242, 243), "neither Rohde's general employment nor his activities at the time of the accident had any direct relation to navigation or commerce," and that (p. 476), "under such circumstances, regulation of the rights, obligations and consequent liabilities of the parties, as between themselves, by a local rule, would not necessarily work material prejudice to any characteristic feature of the general maritime law or interfere with the proper harmony and uniformity of that law." Again, at page 477, the Court said: "Here, the parties contracted with reference to the state statute; their rights and liabilities had no direct relation to navigation, and the application of the local law cannot materially [fol. 49] affect any rules of the sea whose uniformity is essential." The specific answer, "Yes," given to each of the queries placed before the court, must be taken, with the above as meaning that, although "the general admiralty jurisdiction" might under some circumstances extend to a proceeding to recover damages arising from a tort "committed on a vessel in process of construction when lying on navigable waters within a state" (pp. 477-8), yet where, in such a case, the state in question has a local law reaching the particular facts, if these facts and the local law are of such a nature that to permit the latter to apply would in no wise materially affect any rules of the sea whose uniformity is essential to be maintained, the law in question will be allowed to apply, notwithstanding general admiralty jurisdiction. We think, from this Rohde Case and subsequent opinions mentioning it, the view may be fairly deduced that, in a case like the present, where neither the injured person's general employment nor his particular

activities at the time of the accident bear any direct relation to navigation or commerce, a state workmen's compensation law may apply.

Mr. Justice McReynolds, who wrote the opinion in the Rohde Case, subsequently explained its meaning, in Great Lakes Dredge, etc. v. Kierejewski, 261 U. S. 479, 480-1, thus:

"Neither Rohde's general employment nor his activities had any direct relation to navigation or commerce—the matter was purely local—and we were of opinion that application of the state statute, as between the parties, would not work material prejudice to any characteristic feature of the general maritime law or interfere with its proper harmony or uniformity."

Again, in Washington v. Dawson, 264 U. S. 219, 226, he said:

"Grant Smith-Porter Ship Co. v. Rohde was a proceeding in admiralty to recover damages from the ship-builder for injuries which the carpenter received while working on an unfinished vessel moored in the Willamette River at [fol. 50] Portland, Oregon. * * * 'Neither Rohde's general employment nor his activities at the time had any direct relation to navigation or commerce.' We held the matter was only of local concern and that to permit the rights and liabilities of the parties to be determined by the local law would not interfere with characteristic features of the general maritime rules."

Finally, in Miller's indemnity Underwriters v. Brand, 270 U. S. 59, 64, the same Justice said:

"We * * * held [in the Rohde Case] that, under the circumstances disclosed, 'regulation of the rights, obligations and consequent liabilities of the parties, as between themselves, by a local rule, would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law.'"

At another point he said that "the parties [in the Rohde Case] were clearly and consciously within the terms of the

statute [workmen's compensation law of the state] and did not in fact suppose they were contracting with reference to the general system of maritime law."

Miller's Indemnity Underwriters v. Barud, last referred to, Northern Coal & Dock Co. v. Strand, supra, Sultan Ry. v. Dept. of Labor, supra, and Alaska Packer's Assn. v. Industrial Commission, supra, are the most recent cases to give an indication of what is meant by the expression "purely local."

In the Strand Case, the Supreme Court said, as shedding light on the meaning of the phrase in question: "The unloading of a ship is not a matter of purely local concern; it has direct relation to commerce and navigation." We may here remark that, while the kind of work plaintiff in the present case was doing at the time of his injury might be said to have a certain remote relation to navigation and commerce, yet it seems to us that such work cannot be held to bear any "direct" relation to those subjects.

In Underwriters v. Braud, first of the recent cases above [fol. 51] mentioned, a diver employed by a shipbuilding company was killed while submerged in a navigable river, "sawing off timbers of an abandoned set of ways once used for launching ships, which had become an obstruction to navigation." He was awarded damages under a state workmen's compensation law, and in due course this award was affirmed by the Supreme Court of the United States. Mr. Justice McReynolds there said (p. 64):

"In the cause now under consideration, the record discloses facts sufficient to show a maritime tort to which the general admiralty jurisdiction would extend save for the provisions of the state compensation act; but the matter is of mere local concern and its regulation by the state will work no material prejudice to any characteristic feature of the general maritime law."

This can be as well said of the present case, where not even a tort is shown, merely an accidental injury of a character which might have occurred anywhere but which by chance happened on a boat in navigable waters.

In Sultan Ry., etc. v. Department of Labor, appealed from a state court (the third of the recent cases referred to above), the application of a local workmen's compensation law was resisted on the ground that the workers affected—loggers employed by timber and mill companies,—fell under the exclusive jurisdiction of admiralty because their labors carried them upon a navigable stream. In deciding that the local act could apply, the United States Supreme Court said:

"It is settled by our decisions that where the employment, *although maritime in character*, pertains to local matters, *having only an incidental relation to navigation and commerce*, the rights, obligations and liabilities of the parties, as between themselves, may be regulated by local rules which do not work material prejudice to the characteristic features of the general maritime law or interfere with its uniformity."

The above italics are ours. The original contracts of land [fol. 52] employment and the incidental going upon navigable waters in the Sulton Case and in the one now before us seem analogous. As of the loggers in the former, so it may be said of the present plaintiff; that the labor of a maritime character at which he was engaged at the time of his injury had "only incidental relation to navigation and commerce," and since his contract of general employment is not shown to be other than a land contract, the mere incident that its performance carried plaintiff temporarily on navigable waters, was not sufficient to cause that employment, and the rights and liabilities which pertain to it, to be so deprived of their essentially local character that admiralty would take jurisdiction to the exclusion of a helpful state law.

In Alaska P. Assn. v. Industrial Commission (the fourth of the recent cases above mentioned), claimant, originally employed to do both land and sea work, was injured while endeavoring to push a stranded boat into a navigable river; an award under a state compensation act was sustained by the United States Supreme Court, Mr. Justice McReynolds saying, inter alia:

"When injured, certainly he [the claimant] was not engaged in any work so directly connected with navigation

and commerce that to permit the rights of the parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law. The work was really local in character." (Citing there the Rohde and Braud cases.)

It is difficult to deduce and state any general rule by which to judge whether a particular set of facts constitute a "purely local" situation, within the meaning of the federal authorities, to which a local act may apply, or a situation governed exclusively by the maritime law; but, after studying the relevant authorities, it seems to us that in each case the determining questions are:

(1) Did the injured person's activities at the time of the [fol. 53] accident have a direct relation to navigation or commerce?

(2) Were his activities of such a nature that the application of a particular local law, as between the parties, would work material prejudice to some characteristic feature of the general maritime law or interfere with its proper harmony or uniformity? Great Lakes Dredge & Dock Co. v. Kierejewski, 261 U. S. 479, 480-1.

In the present case, plaintiff was a mechanic; not a seaman in any proper sense of that term. So far as the record shows, he had no general maritime employment; he happened to be sent by his employer (a third party engaged by the ship owner) to do some painting in the engine room of a vessel laid up for repairs in navigable waters, and was injured while thus engaged, not by any act on the part of either the ship owner or its employes, nor because of any motion of the boat or other matter peculiar to navigation or commerce, but by pure accident, contributed to by one who, like himself, was working for the contractor engaged by the ship owner. This contractor, third-party employer, and the plaintiff had agreed between themselves that, in case of injury to the latter during the course of his employment, he would be entitled to compensation according to a schedule in the state compensation act. Here, as much as in the Rohde Case, we think it can be said, "the parties, plaintiff and defendant, contracted with reference to the state statute" and "the ap-

plication of the local law" to "their rights and liabilities" "cannot materially affect any rules of the sea whose uniformity is essential." Furthermore, if a state statute allowing recovery in cases of death due to a maritime tort,—a recovery which was not permitted in admiralty—can be allowed application in a stevedore case, as not interfering with the proper harmony and uniformity of the maritime law (Western Fuel Co. v. Garcia, supra), surely a state statute—giving rise to an implied agreement for compensation to a mechanic (whose general employment, so far as the record shows, was not maritime) accidentally injured during the course of his work, which, at the time of the injury, happened to be on a boat in navigable waters—[fol. 54] can be permitted application to the facts in this case, without undue interference with the uniformity of the federal law: see Great Lakes D. & D. Co. v. Kierejewski, supra. As we view it, there is nothing in the situation here presented which will cause material prejudice to any characteristic feature of the general maritime law or interfere with its proper harmony or uniformity if the rights of the parties, between themselves, are adjudged according to the local statute; therefore, we hold that the Pennsylvania Workmen's Compensation Act was properly applied.

In the cases which we have discussed, where admiralty took jurisdiction to the exclusion of the local law, the injury occurred while the person in question was engaged in activities which had a much plainer and more direct relation to navigation than the work of the present claimant. Moreover, in each of those cases the injuries resulted from a maritime tort—that is, a wrongful act committed on the high seas or on navigable waters: Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 59, 60. While the jurisdiction of the federal courts "comprehends all maritime contracts, torts and injuries" (see Campbell v. Hackfeld, 125 Federal Reporter 696, 697, 700 citing and quoting from Judge Story, in DeLovio v. Boit, 2 Gall. 398, 474, Fed. Cas. No. 3, 776), yet in all the federal cases where admiralty relief was afforded to physically injured persons who were not members of the crew of or constantly attached to the ship on which they were hurt, the injuries were attributable to a maritime tort—a fact emphasized in each instance: see, for example, Atlantic Transport Co. v. Imbrovek, 234 U. S. 52,

58 et seq.; Great Lakes v. Kierejewski, 261 U. S. 479, 481; Gonsalves v. Morse, 266 U. S. 171, 172; Northern, etc., Co. v. Strand, not yet reported. Here, as previously stated, no tort was committed; so far as the record indicates, the injury to plaintiff was purely accidental. Under these cir-
[fol. 55] cumstances, since plaintiff cannot in any proper sense be classed as a seaman, entitled in admiralty to a measure of relief for accidental injuries (see The Osceola, 189 U. S. 158), to refuse application of the local compensation law would in effect deprive him of all relief.

We may add, in conclusion, that, since the opinion of the Superior Court in this case—accompanying the final judgment appealed from—was written, the Supreme Court of the United States, in Northern Coal & Dock Co. v. Strand, supra, has definitely held, as we understand the majority view there expressed, that the states have no power, on the ground of implied contract, voluntary election, or any other theory, to put upon an employer, "in respect of men engaged to perform work * * * on shipboard," when their labor bears direct relation to navigation or commerce, obligations of the kind imposed by the workmen's compensation acts; and, in our opinion, the insurance carrier can be held to only such liabilities as may be imposed on the employer. When, as here, however, the labor in question is not shown to bear any direct relation to navigation or commerce, a different situation is presented; and that is the key to the solution of this case.

The judgment is affirmed.

[File endorsement omitted.]

[fol. 56] In Supreme Court of Pennsylvania

[Title omitted]

Petition for Appeal, Assignment of Errors, and Prayer for Reversal—Filed March 5, 1929

Petition for Appeal

To the Honorable the Chief Justice of the Supreme Court of Pennyslvania:

John Baizley Iron Works and The Ocean Accident and Guarantee Corporation, Limited, appellants, considering

themselves aggrieved by the final decision of the Supreme Court of the State of Pennsylvania in the above entitled cause hereby pray that an appeal be granted therefrom, and for an order fixing the amount of the bond thereon, and in support thereof respectfully represent:

1. The statute of the State of Pennsylvania, the validity of which is drawn in question is the Workmen's Compen-
[fol. 57] sation Act of June 2, 1915, P. L. 736, as amended by the Act of June 26, 1919, P. L. 642.

2. The said Pennsylvania statute, as construed by the Supreme Court of Pennsylvania is repugnant to the following provisions of the Constitution of the United States, viz: Article I, Section 8, Clause 3; and Article III, Section 2, Clause 1.

It is also repugnant to the following laws of the United States, viz: Revised Statutes, Sections 563 and 711 (Judicial Code Sections 24 and 256 respectively).

3. Appellants clearly raised this constitutional question in their appeals from the award of the Referee, the order of the Workmen's Compensation Board affirming said award, the judgment of the Court of Common Pleas No. 4 of Philadelphia County, and the judgment of the Superior Court of Pennsylvania. The said constitutional question was the only issue involved in each and all of the said appeals. The Supreme Court of Pennsylvania in its opinion filed January 7, 1929, held that the said Pennsylvania statute, as construed by said Supreme Court to be applicable to regulate the rights and remedies of an employee injured while repairing a vessel lying in navigable waters, did not violate the aforementioned provisions of the Constitution and laws of the United States.

4. This case is reviewable by the Supreme Court of the United States on appeal under Section 237 of the Judicial Code (U. S. Compiled Statutes 1923, Section 1214) because there were clearly drawn into question, from the beginning of the litigation the validity of the said Workmen's Compensation Act of Pennsylvania above referred to on the ground that, as construed by the various tribunals before
[fol. 58] whom the issue was raised, was repugnant to the sections of the Constitution and laws of the United States

above referred to, and the final decision of the Supreme Court of Pennsylvania was in favor of its validity.

5. Attached hereto is the opinion of the Supreme Court of Pennsylvania filed by Mr. Chief Justice von Moschzisker, together with a motion for re-argument as required by the rules of the Supreme Court of Pennsylvania.

Assignments of Error

And the said John Baizley Iron Works and Ocean Accident and Guarantee Corporation, Limited, appellants, assign the following errors in the record and proceedings in the said case.

1. The Supreme Court of the State of Pennsylvánia erred in holding that the claimant, Abraham Span, was entitled to compensation under the Pennsylvania Workmen's Compensation Act.

2. The Supreme Court of Pennsylvania erred in failing to sustain the appellants' contention that the said claimant's cause of action, if any, was subject solely to admiralty and maritime law and not to the Compensation Law of Pennsylvania.

3. The Supreme Court of Pennsylvania erred in holding: "* * * while the kind of work plaintiff in the present case was doing at the time of his injury might be said to have a certain remote relation to navigation and commerce, yet it seems to us that such work cannot be held to bear any direct relation to those subjects."

4. The Supreme Court of Pennsylvania erred in holding: "* * * since his contract of general employment is not [fol. 59] shown to be other than a land contract, the mere incident that its performance carried plaintiff temporarily upon navigable waters was not sufficient to cause that employment, and the rights and liabilities which pertain to it, to be so deprived of their essentially local character that admiralty would take jurisdiction to the exclusion of a helpful state law."

5. The Supreme Court of Pennsylvania erred in holding: "As we view it, there is nothing in the situation here presented which will cause material prejudice to any charac-

teristic feature of the general maritime law or interfere with its proper harmony or uniformity if the rights of the parties, between themselves, are adjudged according to the local statute; therefore, we hold that the Pennsylvania Workmen's Compensation Act was properly applied."

6. The Supreme Court of Pennsylvania erred in entering the following order affirming the judgment of the Superior Court of Pennsylvania:

The judgment is affirmed."

PRAYER FOR REVERSAL

For which errors the appellants, John Baizley Iron Works and Ocean Accident and Guarantee Corporation, Limited, pray that the said judgment of the Supreme Court of the State of Pennsylvania dated January 7, 1929, in the above entitled cause, be reversed and a judgment be rendered in favor of the said appellants, and for costs.

Chas. A. Wolfe, Owen J. Roberts & Montgomery,
Counsel for Petitioners.

Duly sworn to by Chas. A. Wolfe. Jurat omitted in printing.

[fols. 60-82] [File endorsement omitted.]

[fols. 83 & 84] Bond on appeal for $500.00 approved and filed March 7, 1929, omitted in printing.

[fol. 85] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

STIPULATION AND PRÆCIPE FOR TRANSCRIPT OF RECORD—
Filed March 15, 1929

To the Prothonotary of the Supreme Court of Pennsylvania:

And now, to wit: this 15th day of March 1929, Appellants and Appellee, by their respective counsel stipulate that the

transcript of the Record on appeal to the U. S. Supreme Court in the above entitled cause, shall consist of the following portions of the Record, and request you to prepare said transcript and include therein, in the order given below, the following:

1. Order allowing appeal and fixing amount of bond.
2. Citation and affidavit of service thereof.
3. Claim petition filed for compensation.
4. Record before Workmen's Compensation Board:

A. Testimony:

(a) Direct examination of claimant (pp. 11a-16a of Record in Superior Court.)

(b) Cross-examination of claimant (p. 17a of Record in Superior Court.)

B. Opinion of the Referee.

C. Opinion of the Workmen's Compensation Board.

5. Opinion of the Court of Common Pleas, Finletter, J.
6. Opinion of Superior Court of Pennsylvania, Linn, J.

[fol. 86] 7. Agreed statement of facts.

8. Opinion of Supreme Court of Pennsylvania, Moschzisker, C. J.
9. Petition for Appeal, Assignments of Error and Prayer for Reversal.
10. Supersedeas Bond.
11. Stipulation and Præcipe for Transcript of Record.

Chas. A. Wolfe, Owen J. Roberts, of Counsel for Appellants. Samuel Moyerman, Counsel for Appellee.

[File endorsement omitted.]

[fol. 87] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 88] Judge's certificate to Clerk omitted in printing.

Clerk's certificate to Judge omitted in printing.

[fol. 89] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF THE POINTS TO BE RELIED UPON AND STIPULATION IN LIEU OF DESIGNATION AND COUNTER DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed Apr. 4, 1929.

Come now the appellants and adopt their assignments of error as their statement of the points to be relied upon.

Owen J. Roberts, Counsel for Appellants. Charles A. Wolfe, Roberts & Montgomery, of Counsel for Appellants.

And now, to wit, April 2nd, 1929, it is stipulated and agreed by and between Owen J. Roberts, Esq., counsel for Appellants, and Samuel Moyerman, Eeq., counsel for Appellee, that the whole of the record, as filed, except the [fols. 90 & 91] exhibits attached to the petition for appeal, which are contained on pages 61 to 82, inclusive, of the Record, is necessary for the consideration of the above case.

Owen J. Roberts, Counsel for Appellant. Charles A. Wolfe, Roberts & Montgomery, of Counsel for Appellants. Samuel Moyerman, Counsel for Appellee.

[fol. 92] [File endorsement omitted.]

Endorsed on cover: File No. 34,119. Pennsylvania Supreme Court. Term No. 810. John Baizley Iron Works and The Ocean Accident and Guarantee Corporation, Limited, appellants, vs. Abraham Span. Filed April 4th, 1929. File No. 34,119.

FILE COPY

APR 20

CHARLES ELMO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 62

JOHN BAIZLEY IRON WORKS and THE OCEAN ACCIDENT & GUARANTY CORPORATION, Limited, Appellants.

v.

ABRAHAM SPAN.

ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

STATEMENT AS TO JURISDICTION ON APPEAL.

OWEN J. ROBERTS,
Counsel for Appellants.

CHARLES A. WOLFE,
ROBERTS & MONTGOMERY,
Of Counsel.

PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928. No. 810.

John Baizley Iron Works and The Ocean Accident & Guaranty Corporation, Limited, Appellants,

v.

Abraham Span.

STATEMENT AS TO JURISDICTION ON APPEAL.

MAY IT PLEASE THE COURT:

The appellants in support of the jurisdiction of this Court to review the above entitled cause on appeal respectfully represent:

A.

STATUTORY PROVISION SUSTAINING JURISDICTION.

The Act of February 13, 1925, Chapter 229, Section 1; 43 Stat. 937 (U. S. Code, Title 28, Section 344)

provides that Section 237 of the Judicial Code is amended to read in part as follows:

> "SECTION 237. A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

B.

DATE OF DECREE AND DATE OF APPLICATION FOR APPEAL.

The date of the judgment sought to be reviewed was entered by the Supreme Court of Pennsylvania on the 7th day of January, 1929, (R. 1, 55).[1]

The application for appeal was presented to the Chief Justice of the Supreme Court of Pennsylvania

[1] All references to the record are to the pages of the certified unprinted record prepared by the Clerk of the Supreme Court of Pennsylvania and on file with the Clerk of this Court. The record has not yet been printed.

on the 5th day of March, 1929 (R. 60); and was allowed by the said Chief Justice on the 6th day of March, 1929 (R. 2).

C.

NATURE OF CASE AND RULING BELOW.

The Referee, the Workmens Compensation Board, the Court of Common Pleas of Philadelphia County, the Superior Court of Pennsylvania and the Supreme Court of Pennsylvania have all held that the Workmens Compensation Law of Pennsylvania (Act of June 2, 1915, P. L. 736), as construed by them to be applicable to regulate the rights and remedies of the appellee, a workman injured while engaged in performing repairs in the boiler room on board a steamship lying in navigable waters, did not violate the provisions of the Constitution and laws of the United States, to wit: Article I, Section 8, Clause 3, and Article III, Section 2, Clause 1, of the Constitution of the United States, and the Act of September 24, 1789, Chapter 20, Section 9, 11; 1 Stat. 76, 78, United States Code, Title 28, Section 371, (Judicial Code Section 256).

The principal contention made by the appellants in all of the successive appeals herein was that the said Pennsylvania Workmens Compensation Act as so construed would be repugnant to the Constitution and laws of the United States above referred to. This contention was raised by appellants in the Court of Common Pleas of Philadelphia County (R. 24). The

said court denied this contention and dismissed the appeal (R. 29). The same contention was raised by the appellants in the Superior Court of Pennsylvania (R. 30), and was denied by the said court (R. 31, 32). The same contention was raised by the appellants in the Supreme Court of Pennsylvania (R. 37), and was denied by the said court (R. 53-55).

D.

CASES BELIEVED TO SUSTAIN JURISDICTION.

The following decisions of this Court are believed to sustain jurisdiction of this appeal:

Dahnke-Walker Milling Co. *v.* Bondurant, 257 U. S. 282;

United Fuel Gas Co. *v.* Hallanan, 257 U. S. 277;

Eureka Pipe Line Co. *v.* Hallanan, 257 U. S. 265;

Merchants National Bank of Richmond *v.* Richmond, 256 U. S. 635.

We respectfully submit that this Court has jurisdiction of this appeal by virtue of Section 237 of the Judicial Code as amended by the Act of February 13, 1925.

Respectfully submitted,

OWEN J. ROBERTS,

Counsel for Appellants.

CHARLES A. WOLFE,

ROBERTS & MONTGOMERY,

Of Counsel for Appellants.

FILE COPY

NOV 6

CHARLES ELMO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 810.

JOHN BAIZLEY IRON WORKS and THE OCEAN ACCIDENT & GUARANTY CORPORATION, Limited, Appellants,

v.

ABRAHAM SPAN.

ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

BRIEF FOR APPELLANTS.

OWEN J. ROBERTS,
Counsel for Appellants.

CHARLES A. WOLFE,
ROBERTS & MONTGOMERY,
Of Counsel.

PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA.

SUBJECT INDEX.

PAGE

I. REFERENCE TO THE OFFICIAL REPORTS OF THE OPINIONS DELIVERED BY THE COURTS BELOW.... 1

II. STATEMENT OF THE CASE..... 2

III. SPECIFICATION OF ERRORS..... 4

IV. ARGUMENT..... 6

SUMMARY OF THE ARGUMENT:

POINT A. The principle of uniformity in admiralty and maritime matters required by the federal constitution, as defined in the case of Southern Pacific Company *v.* Jensen, 244 U. S. 205, has been consistently adhered to by this Court..... 8

I. Constitutional and statutory provisions upon which the doctrine is based..... 8

II. The doctrine defined..... 9

III. The doctrine remains unimpaired notwithstanding the attacks upon it..... 13

(*a*) It cannot be destroyed by congressional legislation..... 14

(*b*) It is not based upon the nature of a particular statute—whether compulsory or elective... 16

PAGE

(*c*) An insurance company, directly liable by statute to an injured employee, is not estopped to raise the question of the applicability of a local compensation act..... 24

(*d*) The doctrine is not limited to claims against the owner of the vessel..... 26

(*e*) No case presents a "matter of mere local concern" is which concur the facts: (1) that the employee was working under a maritime contract, (2) that his activities at the time he was injured had direct relation to navigation and commerce, and (3) that he was injured while on board a vessel lying in navigable waters..... 27

POINT B. The Pennsylvania Workmen's Compensation Act, as construed by the Supreme Court of Pennsylvania to be applicable to regulate the rights and remedies of the appellee, a workman injured while engaged in performing repairs to and upon a steamship lying in navigable waters, is unconstitutional..... 45

PAGE

I. The parties in the case at bar are not "clearly and consciously within the terms of the state statute," and they did not contract with reference thereto.... 48

II. The terms of the general contract of employment between the parties are unimportant..... 52

III. Span's activities at the time his injuries were sustained had direct relation to navigation and commerce..... 54

IV. The fact that Span's injuries may not have been due to a tort, is no reason for permitting the application of the local act..... 57

CONCLUSION..... 64

TABLE OF CASES CITED.

Alaska Packers Ass'n *v.* Industrial Accident Commission, 276 U. S. 467.....33–34

Atlantic Transport Co. *v.* Imbrovek, 234 U. S. 52. 55

Clyde Steamship Co. *v.* Walker, 244 U. S. 255... 61

Danielsen *v.* Morse Dry Dock Co., 235 N. Y. 439 (1923) (s. c. 262 U. S. 756).....27, 56

Doey *v.* Howland, 224 N. Y. 30 (1918) (s. c. 248 U. S. 574).....35–36, 56

Gonsalves *v.* Morse Dry Dock Co., 266 U. S. 171..37, 56

Grant Smith-Porter Co. *v.* Rohde, 257 U. S. 469..16–19, 28, 50

Great Lakes Dredge & Dock Co. *v.* Kierjewski, 261 U. S. 479.....36–37, 55

International Stevedoring Co. *v.* Haverty, 272 U. S. 50.....26, 55

PAGE

James Rolph Co. *v.* Ind. Accident Com., 220 Pac. 669 (1923) (s. c. 264 U. S. 219).....25, 61–62

Knickerbocker Ice Co. *v.* Stewart, 253 U. S. 149..12, 61

London Guarantee & Accident Co. *v.* Ind. Accident Com., 73 L. ed. 368 (U. S. Sup. Ct. Adv. Op. 5/1/29).....42–44, 62

March *v.* Vulcan Iron Works, 102 N. J. L. 337 (1925) (s. c. 271 U. S. 682).....20, 27, 56, 63

Messel *v.* Foundation Co., 274 U. S. 427..27, 39–40, 56

Millers Indemnity Underwriters *v.* Braud, 270 U. S. 59 (s. c. 245 S. W. 1025 (1922); Texas Civ. App.)..29, 50

Matter of Lahti *v.* Terry & Tench, 240 N. Y. 292 (1925) (s. c. 273 U. S. 639)..... 22

New Bedford Dry Dock *v.* Purdy, 258 U. S. 96.. 46

Northern Coal & Dock Co. *v.* Strand, 278 U. S. 142; 73 L. ed. 99.....23, 27, 41–42, 53

Peters *v.* Veasey, 251 U. S. 121..... 19

Robins Dry Dock Co. *v.* Dahl, 266 U. S. 449..38, 46, 56

Rosengrant *v.* Havard, 273 U. S. 664 (s. c. 211 Ala. 605 (1924); 213 Ala. 202 (1925)).....31–32

Smith & Son *v.* Taylor, 276 U. S. 179..... 33

Southern Pac. Co. *v.* Jensen, 244 U. S. 205...9–11, 59, 60

Southern Surety Co. *v.* Nina Crawford, 274 S. W. 280 (1925) (s. c. 270 U. S. 655).....30–31

State Ind. Com. *v.* Nordenholt, 259 U. S. 263...28–29, 51

State Ind. Board of New York *v.* Terry & Tench Co., 273 U. S. 639.....22, 31

Sultan Rwy. & Tim. Co. *v.* Dep't of Labor, 277 U. S. 135.....34–35

The Robert W. Parsons, 191 U. S. 17..... 46

Union Fish Co. *v.* Erickson, 248 U. S. 308..... 51

Washington *v.* Dawson & Co., 264 U. S. 219.....15, 62

TABLE OF STATUTES CITED.

PAGE

1. Federal

Act of September 24, 1789, c. 20 § 9; 1 Stat. 76 8

Judicial Code § 24 (U. S. C. Title 28 § 41) R. S. § 563; March 3, 1911, 36 Stat. 1091, c. 231 § 24; October 6, 1917, 40 Stat. 395, c. 97 § 1; June 10, 1922, 42 Stat. 634, c. 216 § 1 ..... 9, 12, 14

Judicial Code § 256 (U. S. C. Title 28 § 371) R. S. § 711; March 3, 1911, 36 Stat. 1160 c. 231 § 256; October 6, 1917, 40 Stat. 395, c. 97 § 2; June 10, 1922, 42 Stat. 635, c. 216 § 2 ..... 9, 14

Act of June 5, 1920, 41 Stat. 1007, c. 250 § 33 (U. S. C. Title 46 § 688) 42

2. Pennsylvania

Act of June 2, 1915, P. L. 736, Art. III §§ 301, 302(a), 305 48–49

Act of June 2, 1915, P. L. 769, § 1 24

Act of June 26, 1919, P. L. 642, § 401, Art. IV P. L. 659 24

Act of April 7, 1921, P. L. 114 (No. 67), § 1 .. 49

OTHER AUTHORITIES CITED.

73 University of Pennsylvania Law Review 123, 223 (1925) 13

38 Yale Law Journal, 472 (1929) 13

75 University of Pennsylvania Law Review 382 (1927) 14

40 Harvard Law Review 485 (1927) 23

I.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the Superior Court of Pennsylvania, delivered by Linn, *J.* (R. 16), is reported in *Span* v. *Accident and Guarantee Corporation,* 92 Pa. Super. Ct. 418.

The opinion of the Supreme Court of Pennsylvania, delivered by Moschzisker, *C. J.* (R. 20), is reported in *Span* v. *John Baizley Iron Works, et al.,* 295 Pa. 18.

II.

STATEMENT OF THE CASE.

This case arose upon a claim for compensation under the Workmen's Compensation Act of Pennsylvania made by the appellee, Abraham Span, a blacksmith's helper, against his employer, John Baizley Iron Works, one of the appellants.

At the time the injuries in question were sustained, to wit, on January 13, 1926, the John Baizley Iron Works was engaged in performing certain repairs to the steamship "Bald Hill," including, *inter alia,* the painting of the iron in the engine room and repairs to the floor of the engine room. The said vessel had theretofore steamed to Philadelphia for the necessary repairs, and at the time of the accident was tied up to Pier 98, South, in the Delaware River, at Philadelphia (R. 2, 4, 19). The appellee, Span, in the course of his said employment by the said appellant was painting angle irons in the engine room of the vessel when he called to a fellow employee, operator of an acetylene torch, asking him "to burn the iron on the other side" (R. 5). Sparks from the torch entered Span's right eye (R. 8) and caused injuries resulting in the alleged disability of the claimant.

An award of compensation was made by the Referee against the Ocean Accident and Guarantee Corporation, Ltd., the employer's insurance carrier (R. 9), which award was affirmed on successive appeals to the Workmen's Compensation Board (R. 10), the

Court of Common Pleas No. 4 of Philadelphia County (R. 13), the Superior Court of Pennsylvania (R. 16), and the Supreme Court of Pennsylvania (R. 19), notwithstanding the appellants' contention that the rights, liabilities and remedies of the parties could be determined only by the general maritime law, and that the Pennsylvania Workmen's Compensation Act, as construed by the said Courts to be applicable to this case, would be repugnant to the well-known provisions of the Constitution and laws of the United States hereinafter referred to.

III.

SPECIFICATION OF ERRORS.

1. The Supreme Court of Pennsylvania erred in finding and holding that the appellee was entitled to compensation under the Pennsylvania Workmen's Compensation Act and in failing to sustain appellants' contention that the appellee's cause of action, if any, was cognizable solely by the general maritime law.

2. The Supreme Court of Pennsylvania erred in finding and holding: "* * * while the kind of work plaintiff in the present case was doing at the time of his injury might be said to have a certain remote relation to navigation and commerce, yet it seems to us that such work cannot be held to bear any 'direct' relation to those subjects" (R. 33).

3. The Supreme Court of Pennsylvania erred in finding and holding: "* * * since his contract of general employment is not shown to be other than a land contract, the mere incident that its performance carried plaintiff temporarily on navigable waters, was not sufficient to cause that employment, and the rights and liabilities which pertain to it, to be so deprived of their essential local character that admiralty would take jurisdiction to the exclusion of a helpful state law" (R. 34).

4. The Supreme Court of Pennsylvania erred in finding and holding: "As we view it, there is noth-

ing in the situation here presented which will cause material prejudice to any characteristic feature of the general maritime law or interfere with its proper harmony or uniformity if the rights of the parties, between themselves, are adjudged according to the local statute; therefore, we hold that the Pennsylvania Workmen's Compensation Act was properly applied" (R. 36).

IV.

ARGUMENT.

Summary of the Argument.

Point A. The principle of uniformity in admiralty and maritime matters required by the federal constitution, as defined in the case of Southern Pacific Company *v.* Jensen, 244 U. S. 205, has been consistently adhered to by this Court.

I. Constitutional and statutory provisions upon which the doctrine is based.

II. The doctrine defined.

III. The doctrine remains unimpaired notwithstanding the attacks upon it.

(*a*) It cannot be destroyed by congressional legislation.

(*b*) It is not based upon the nature of a particular statute—whether compulsory or elective.

(*c*) An insurance company, directly liable by statute to an injured employee, is not estopped to raise the question of the applicability of a local compensation act.

(*d*) The doctrine is not limited to claims against the owner of the vessel.

(*e*) No case presents a "matter of mere local concern" in which concur the facts: (1) that the employee was working under a maritime contract, (2) that his activities at the time he was injured had direct relation to navigation and commerce, and (3) that he was injured while on board a vessel lying in navigable waters.

Point B. The Pennsylvania Workmen's Compensation Act, as construed by the Supreme Court of Pennsylvania to be applicable to regulate the rights and remedies of the appellee, a workman injured while engaged in perfoming repairs to and upon a steamship lying in navigable waters, is unconstitutional.

I. The parties in the case at bar are not "clearly and consciously within the terms of the state statute," and they did not contract with reference thereto.

II. The terms of the general contract of employment between the parties are unimportant.

III. Span's activities at the time his injuries were sustained had direct relation to navigation and commerce.

IV. The fact that Span's injuries may not have been due to a tort, is no reason for permitting the application of the local act.

POINT A.

The principle of uniformity in admiralty and maritime matters required by the federal constitution, as defined in the case of *Southern Pacific Company* v. *Jensen*, 244 U. S. 205, has been consistently adhered to by this Court.

I. Constitutional and statutory provisions upon which the doctrine is based.

Article III, Section 2, Clause 1 of the federal constitution extends the judicial power of the United States "to all Cases of admiralty and maritime Jurisdiction."

Article I, Section 8, Clause 18 grants to Congress the power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

In pursuance of the foregoing constitutional provisions, Congress has passed various laws relating to jurisdiction over admiralty and maritime causes. Section 9 of the Judiciary Act, September 24, 1789 c. 20 (I Stat. 76) provided:

> "That the district courts shall have, exclusively of the courts of the several States * * * exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction * * * saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; * * *."

This enactment was carried into the Revised Statutes, Sections 563 and 711, and thence into the Judicial Code, Section 24; 36 Stat. 1091, in which it is provided:

> "The district courts shall have original jurisdiction as follows: * * *.
>
> "Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it, * * *,"

and Judicial Code, Section 256; 36 Stat. 1160, in which it is provided:

> "The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States: * * *
>
> "Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it, * * *."

II. The Doctrine Defined.

The first case in which this Court considered the constitutionality of a state Workmen's Compensation Act when applied to a maritime cause, was the case of

Southern Pacific Co. v. Jensen, 244 U. S. 205.

Jensen, the deceased workman, was employed as a stevedore by the Southern Pacific Company, a Kentucky corporation, which was a common carrier by railroad and also owned the steamship "El Oriente"

plying between the ports of New York and Galveston, Texas. While assisting in the unloading of the vessel, then berthed at Pier 49, North River, N. Y., Jensen sustained injuries on board the vessel which caused his death. A claim petition was filed under the Workmen's Compensation Act of New York and an award was made which was affirmed by the New York courts.

On appeal to this Court, Mr. Justice McReynolds, speaking for the majority, after reviewing the provisions of the federal constitution and statutes above referred to, said (p. 216):

> "In view of these constitutional provisions and the federal act it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied. A lien upon a vessel for repairs in her own port may be given by state statute, * * *; pilotage fees fixed, * * *; and the right given to recover in death cases, * * *. Equally well established is the rule that state statutes may not contravene an applicable act of Congress or affect the general maritime law beyond certain limits. They cannot authorize proceedings *in rem* according to the course in admiralty, * * *; nor create liens for materials used in repairing a foreign ship, * * *. And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the char-

acteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself."

Returning to a consideration of the facts in the case before the Court, he said (p. 217):

"The work of a stevedore in which the deceased was engaging is maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction. *Atlantic Transport Co.* v. *Imbrovek,* 234 U. S. 52, 59, 60.

"If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other States may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded."

It was then held that the remedy which the New York compensation statute attempted to give was of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and was not saved to suitors from

the grant of exclusive jurisdiction to the Federal District Courts; that the New York legislature exceeded its authority in attempting to extend the statute to conditions such as were there disclosed; and that the said Compensation Act, as so applied, conflicted with the constitution, and to that extent was invalid.

Three years later, in the case of

Knickerbocker Ice Co. v. Stewart, 253 U. S. 149,

this Court again considered the constitutionality of the New York Compensation Statute, in the light of the amendment by Congress to the Judiciary Act (October 6, 1917, c. 97, 40 Stat. 395), adding to the saving clause, the words: "* * * and to claimants the rights and remedies under the workmen's compensation law of any state."

In holding this attempted amendment unconstitutional, Mr. Justice McReynolds, again speaking for the majority, further defined and clarified the doctrine of uniformity in admiralty matters adopted by this Court, saying (p. 160):

> "As the plain result of these recent opinions and the earlier cases upon which they are based, we accept the following doctrine: The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the States

all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal Government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere."

III. The Doctrine remains unimpaired notwithstanding the attacks upon it.

The issue in the case at bar is, we believe, beyond the realm of legal philosophy and legal theory, and we do not propose therefore to enter into a discussion of the history of the development of the uniformity doctrine, or of the principles of constitutional construction and public policy which led to its adoption. Much has been written on these subjects since the decision in the *Jensen case*.*

But the criticism of and attacks upon the doctrine of the *Jensen case* have not prevailed. The doctrine has become definitely established as part of the general maritime law, and this Court has consistently applied and adhered to it, notwithstanding the constant efforts of various courts and admiralty lawyers to evade and circumvent it. Indeed the persistency of such efforts is almost inexplicable—they are due

* See, for example, Wright, Uniformity in the Maritime Law of the United States, 73 U. of Pa. L. Rev. 123, 223 (1925); Morrison, Workmen's Compensation Law and the Maritime Law, 38 Yale Law Journal 472 (1929).

in part, perhaps, to the age old conflict between the admiralty and the common law courts, and in part, perhaps, to the jealousy of the state courts over the limits of their jurisdiction, but the persistency of such efforts can probably be ascribed chiefly to the ignorance by the state courts of the broad principles of public policy which led this Court to adopt and adhere to the uniformity doctrine in admiralty matters.*

(a) *It cannot be destroyed by congressional legislation.*

The opponents of the doctrine first attributed it to the supposed inadequacy of the saving clause in Section 9 of the Judiciary Act above referred to and accordingly enlisted the aid of Congress in their cause with the result that within six months after the decision in the *Jensen case* the amendment to the Judiciary Act was adopted which this Court considered in the *Knickerbocker case (supra).*

Another effort in the same direction was made by Congress in the amendment to the Judiciary Act of June 10, 1922, c. 216, 42 Stat. 634 (Judicial Code, Sections 24 and 256; U. S. C. Title 28, Sections 41 and 371). This amendment sought to add to the saving clause the words: "* * * and to claimants for compensation for injuries to or death of persons

* Prof. Biklé in his review of Dean Hall's second edition of Cases on Constitutional Law said (75 U. of Pa. L. Rev. 382, February, 1927): "All of the new cases are decisions of the Supreme Court of the United States, a fact that tends, perhaps through no intention of the editor, to indicate how seldom it is that a State court deals adequately with a question of constitutional law arising under the Federal Constitution."

other than the master or members of the crew of a vessel, their rights and remedies under the workmen's compensation law of any State, District, Territory or possession of the United States."

This attempt to avoid the effect of the *Jensen case* met with the same fate as the previous one. The amendment was considered by this Court in the cases of *State of Washington* v. *Dawson & Co.,* and *Industrial Accident Commission of California* v. *James Rolph Co.,* decided by one opinion *sub nom.*

State of Washington v. Dawson & Co., 264 U. S. 219.

It was there contended that the doctrine of the *Jensen case* had been modified by the later decisions in *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U. S. 469 (post), and *Industrial Commission* v. *Nordenholt Co.,* 259 U. S. 263 (post), but Mr. Justice McReynolds, again speaking for the majority, after reviewing the cases, said (p. 228):

> "This cause presents a situation where there was no attempt [by Congress] to prescribe general rules. On the contrary, the manifest purpose was to permit any State to alter the maritime law and thereby introduce conflicting requirements. To prevent this result the Constitution adopted the law of the sea as the measure of maritime rights and obligations. The confusion and difficulty, if vessels were compelled to comply with the local statutes at every port, are not difficult to see. Of course, some within

the States may prefer local rules; but the Union was formed with the very definite design of freeing maritime commerce from intolerable restrictions incident to such control. The subject is national. Local interests must yield to the common welfare. The Constitution is supreme."

(b) *It is not based upon the nature of a particular statute—whether compulsory or elective.*

In addition to this line of attack upon the doctrine of uniformity in admiralty matters, its opponents have persistently endeavored to limit its application to the precise facts in the *Jensen case.* Practically every fact which was disclosed by the record in that case has been seized upon as a basis for distinguishing the case from other cases in which such fact did not appear.

The New York Workmen's Compensation Act considered in the *Jensen case* was of the compulsory type. Critics of the decision immediately attempted to distinguish all cases in which the Compensation Act in question was of the elective type,* and professed to find support for such a distinction in the case of

Grant Smith-Porter Co. v. Rohde, 257 U. S. 469.

In that case, the claimant, while employed as a carpenter engaged in construction work on board an uncompleted vessel lying in navigable waters in the

* The decision of the Superior Court of Pennsylvania in the case at bar was based upon this alleged distinction, as the Pennsylvania Workmen's Compensation Act is of the elective type.

State of Oregon, was injured. A libel *in personam* was filed against his employer to recover damages, and judgment was rendered for the plaintiff by the District Court sitting in admiralty. The defendant appealed to the Circuit Court of Appeals which certified to this Court for instructions, the following questions:

> "1. Is there jurisdiction in admiralty because the alleged tort occurred on navigable waters?
>
> "2. Is libellant entitled because of his injury to proceed in admiralty against respondent for the damages suffered?"

It appeared that the Oregon Workmen's Compensation Law was of the elective type and that the remedy provided therein, was made exclusive of all other claims against the employer. Mr. Justice McReynolds, speaking for this Court, in the first place pointed to the fact that the work upon which Rohde was engaged at the time of the accident was not maritime in nature, and said (pp. 475-6):

> "The contract for constructing 'The Ahala' was non-maritime, and although the incompleted structure upon which the accident occurred was lying in navigable waters, neither Rohde's general employment, nor his activities at the time had any direct relation to navigation or commerce."

It was obvious, since the contract of employment was non-maritime and the activities of the claimant at the time his injuries were sustained had no direct

relation to navigation and commerce, that no characteristic feature of the maritime law was affected, and that the application of the state act would not interfere with the proper harmony and uniformity of the maritime law in its international or interstate relations,—that it was a "matter of mere local concern."

In answer to the certified questions, the opinion proceeded to state (pp. 477-8):

> "Construing the first question as meaning to inquire whether the general admiralty jurisdiction extends to a proceeding to recover damages resulting from a tort committed on a vessel in process of construction when lying on navigable waters within a State, we answer, yes.
>
> "Assuming that the second question presents the inquiry whether in the circumstances stated the exclusive features of the Oregon Workmen's Compensation Act would apply and abrogate the right to recover damages in an admiralty court which otherwise would exist, we also answer, yes."

Since the matter was of mere local concern for the reasons above noted, it is clear that the decision was in no sense a "trek backward" from the doctrine of the *Jensen case,* as it was hailed in some quarters. The uniformity doctrine forbids the application of such state legislation, only, as will work material prejudice to characteristic features of the general maritime law or will interfere with the proper harmony and uniformity of that law in its international and interstate relations. Under the circumstances

disclosed in the *Rohde case,* the doctrine therefore was not at all involved. This fact was clearly indicated in the opinion in the following language (p. 477):

> "This conclusion accords with *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205; *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372; *Union Fish Co.* v. *Erickson,* 248 U. S. 308; and *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149. In each of them the employment or contract was maritime in nature and the rights and liabilities of the parties were prescribed by general rules of maritime law essential to its proper harmony and uniformity. Here the parties contracted with reference to the state statute; their rights and liabilities had no direct relation to navigation, and the application of the local law cannot materially affect any rules of the sea whose uniformity is essential."

Opponents of the uniformity doctrine, however, disregarding the fundamental difference between the *Rohde case* and the *Jensen case,* have interpreted it to stand for the proposition that while a compulsory state workmen's compensation act could not be permitted to work material prejudice to any characteristic feature of the general maritime law, a so-called "elective" workmen's compensation act would be applied to a maritime cause even though characteristic features of the general maritime law were involved.

A prompt answer to this contention could have been found in the case of

Peters v. Veasey, 251 U. S. 121,

decided before the *Rohde case,* in which it was held that the Workmen's Compensation Law of Louisiana—an elective act—could not be applied to regulate the rights and remedies of a stevedore injured on board a vessel lying in navigable waters, although the defendant in error in that case made no contention based upon the elective features of the act.

This alleged distinction, however, met with some success in various state courts, including, as has been observed, the Superior Court of Pennsylvania in the case at bar. Other courts were not mislead. In the case of

March v. Vulcan Iron Works, 102 N. J. L. 337 (1925),

it appeared that the defendant iron works owned a floating dry-dock in which were placed vessels undergoing repairs. Deceased was a foreman in the defendant's boiler ship and it was his duty to supervise the construction of boilers for the defendant as well as to inspect boilers on vessels being repaired by the defendant. While climbing a ladder from the deck of the dry-dock to the deck of a vessel undergoing repairs therein, he fell to the deck of the dry-dock and sustained injuries resulting in his death. A claim was filed for compensation under the New Jersey statute, the claimant contending that under the decision in the *Rohde case,* the local compensation act could be applied because it was of the elective type. The New Jersey courts held, however, that the *Rohde case* did not establish such a distinc-

tion, and a petition for a certiorari was subsequently denied by this Court (271 U. S. 682).

It seems clear that if characteristic features of the maritime law are involved in the rights of stevedores or other persons engaged in maritime employment, who may be injured on navigable waters, those features are prejudiced when they are superseded by an exclusive state law whether the parties have so elected or not. This proposition is self evident: if a ship owner were required to ascertain the local law at every port into which his vessels entered, or a company engaged at various ports in repairing vessels were obliged to ascertain the local law at every port to which its employees might be sent in the performance of their duties, in order to determine whether that local law included a workmen's compensation act which might be either compulsory or elective, and in the latter case to determine what steps must be taken to avoid the application of the local act so that the rights and remedies of persons on board the vessels could be governed by the general maritime law, the result would be as serious a fettering of trade as though the local law in each instance sought to compel such persons to submit to its jurisdiction.

Certainly the parties cannot by their own election, with or without state sanction, secure to state tribunals a jurisdiction which it is beyond the power of Congress to grant. Indeed, while such an act as the Pennsylvania Workmen's Compensation Act is

referred to as an "elective" act, it seems rather illusory to give it such an appellation. The right to elect not to be bound by the act is in the nature of a condition subsequent and it is well known that a real election is seldom, if ever, consciously made by the parties; the result being that the remedial provisions of the act are almost invariably enforced.

This Court has itself expressly disaffirmed the existence of such a distinction between the effect of a compulsory act and an elective compensation act in the case of

State Industrial Board of New York v. Terry & Tench Co., 273 U. S. 639,

in which a decision of the New York Court of Appeals reported *sub nom. Matter of Lahti* v. *Terry & Tench Co.*, 240 N. Y. 292, was "Reversed upon the authority of *Miller's Indemnity Underwriters* v. *Braud, et al.*, 270 U. S. 59."

It appeared in that case that the claimant was injured while standing on a floating raft employed in the construction of a pier in New York Bay. The floating raft was not a vessel which could be used in commerce and the New York Court pointed out that while the plaintiff's injury was maritime, the contract of employment was not.

An award was made under the workmen's compensation act, but the New York Court of Appeals unanimously reversed the award. It construed the *Jensen case* to stand for the principle that the law of the sea could not be displaced by a compulsory

compensation act, and interpreted the *Rohde case* to stand for the proposition that the parties might elect to be governed by a workmen's compensation act, instead of admiralty rules.

The reversal of that decision by this Court in a *per curiam* opinion has been criticized,* but fifteen cases had been considered by this Court since the *Jensen case* in which the uniformity doctrine had been discussed and clarified, and we suspect that the summary treatment accorded the decision of the New York Court of Appeals was an indication of the growing impatience of this Court with the obtusity so often shown by some state courts in overlooking the fundamental principles enunciated in the *Jensen case,* and endeavoring to avoid their application by an alleged distinction, which was in fact not a distinction.

If any doubt remained as to the attitude of this Court toward the contention that an elective compensation act could be applied to a maritime cause, it was completely dispelled by the decision in the case of

Northern Coal & Dock Co. v. Strand, 278 U. S. 142; 73 L. ed. 99.

Compensation had been granted under the Workmen's Compensation Act of Wisconsin—of the elective type—to the widow of the decedent, who died as a result of injuries sustained while he was assisting with the unloading of a vessel lying in navigable

*40 Harvard Law Rev. 485.

waters. Commenting upon the provisions of the Wisconsin statute, Mr. Justice McReynolds said (p. 145):

> "There is nothing in the record to indicate that when contracting with its stevedores the Dock Company actually agreed to subject itself to the liabilities imposed by the State Compensation Act. And it is enough here to say that the State had no power to impose upon an employer liabilities of that kind in respect of men engaged to perform the work of stevedores on shipboard."

(c) *An insurance company, directly liable by statute to an injured employee, is not estopped to raise the question of the applicability of a local compensation act.*

Another argument advanced in an effort to avoid the application of the uniformity doctrine is based upon the fact that under some state statutes the employer's insurance carrier is made directly liable for compensation to an injured employee. It is argued therefore that the insurance carrier is the sole party in interest, is directly bound by its policy contract and is estopped to repudiate an obligation voluntarily assumed for a valuable consideration. The Pennsylvania legislation contains such provisions, as it defines "employer" as including the insurer, and requires that the insurance carrier agree to be responsible directly to the employee for payment of compensation.*

* Act of June 2, 1915, P. L. 769, Section 1, as supplemented by the Act of June 26, 1919, P. L. 642, Section 401, Article IV, P. L. 659.

After referring to this legislation, the Superior Court of Pennsylvania concluded (R. 17): "The judgment in this case against the insurer is in accord with the statute." The same argument is made by the appellee in his Reply filed in this Court to appellant's Statement as to Jurisdiction on Appeal, wherein it is contended (p. 4): "The insurance carrier may not lawfully agree to render compensation in case of injury, accept a premium or premiums therefor, and not be estopped to set up as a defense to an award against it that the Act under which they had agreed to act is unconstitutional."

Such an argument too obviously begs the question to merit a reply. The insurance carrier agrees to render compensation, and accepts a premium therefor, in cases where the claim is **within the jurisdiction of the Pennsylvania Workmen's Compensation Board.** It does not agree to render compensation upon maritime claims, nor does it receive a premium therefor. Of course, if it be assumed that the claim in question is subject to the jurisdiction of the Workmen's Compensation Board, then the conclusion of the Superior Court of Pennsylvania and of the appellee is sound—**but that is the question of law under consideration.**

This same argument was made by the Industrial Accident Commission of California in the case of

James Rolph Co. v. Industrial Accident Commission, 220 Pac. 669 (1923),

one of the two cases considered by this Court in the case of *Washington* v. *Dawson (supra)*. The Cali-

fornia courts, however, detected the fallacy inherent in the argument and rightly repudiated it.

(d) *The doctrine is not limited to claims against the owner of the vessel.*

Efforts have also been made to base the doctrine of the *Jensen case* upon the fact that the employer—defendant therein, was the owner of the vessel; upon the theory that while the application of local workmen's compensation acts as against such an employer would interfere with the proper harmony and uniformity of the general maritime law, the application of such acts as against an independent stevedoring concern or a ship repairing company would not have that effect.

The absurd result of such an argument is to maintain that if two stevedores or repairmen be working on a vessel, one of whom is employed by the owner of the vessel and the other by an independent contractor, and both be injured on board the vessel as a result of the same accident, the former could recover only in admiralty while the latter would be subject to the jurisdiction of the local workmen's compensation act. Mr. Justice Holmes said in the case of

International Stevedoring Co. v. Haverty, 272 U. S. 50, 52.

"We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship."

Neither can we believe that this Court would countenance such a distinction. In a number of cases before this Court, a local workmen's compensation act has been held inapplicable notwithstanding the fact that the employer was not the owner of the vessel, as for example:

Messel v. Foundation Co., 274 U. S. 427 (post);
Northern Coal & Dock Co. v. Strand, 278 U. S. 142 (post);
March v. Vulcan Iron Works, 102 N. J. L. 337 (1925) (Cert. denied, 271 U. S. 682);
Danielsen v. Morse Dry Dock Co., 235 New York 439 (1923) (Cert. denied, 262 U. S. 756).

(e) *No case presents a "matter of mere local concern" in which concur the facts: (1) that the employee was working under a maritime contract, (2) that his activities at the time he was injured had direct relation to navigation and commerce, and (3) that he was injured while on board a vessel lying in navigable waters.*

As a necessary corollary to the uniformity doctrine it has always been held that state workmen's compensation acts may be treated as amending or modifying the maritime law in cases where they concern purely local matters and occasion no interference with the uniformity of such law in its international and interstate relations. Having been rebuffed in all of the direct and indirect assaults upon the uniformity doctrine above discussed, the favorite resort of its opponents now is to designate almost any set of facts

arbitrarily, as a "matter of mere local concern," again disregarding entirely the significance of that phrase as it has been defined by this Court. We wish therefore to consider the facts in the cases which this Court has designated as matters of local concern.

In the *Rohde case (supra)* the matter was clearly of mere local concern because the contract for constructing the vessel was non-maritime, and as the vessel was uncompleted when Rohde was injured, neither his general employment nor his activities at the time had any direct relation to navigation and commerce.

In the case of

State Industrial Commission v. Nordenholt, 259 U. S. 263,

a stevedore engaged in unloading a vessel at a pier in New York Harbor was injured while on the dock (an extension of the land). It was held that the Workmen's Compensation Act of the State of New York applied to the case, and in pointing out the difference between its facts and the facts in the *Jensen case,* Mr. Justice McReynolds said (pp. 272-3):

> "When an employee, working on board a vessel in navigable waters, sustains personal injuries there, and seeks damages from the employer, the applicable legal principles are very different from those which would control if he had been injured on land while unloading the vessel. In the former situation the liability of the employer must be determined under the maritime law; in the latter, no general maritime rule prescribes the liability, and the local law has always been applied. The

liability of the employer for damages on account of injuries received on shipboard by an employee under a maritime contract is matter within the admiralty jurisdiction; but not so when the accident occurs on land.

"The injuries out of which *Southern Pacific Co.* v. *Jensen* arose occurred on navigable waters, and the consequent rights and liabilities of the parties were prescribed by the maritime law. The question there was whether these rules could be superseded by the Workmen's Compensation statute of the State, and this court held they could not. In the opinion, citing *Atlantic Transport Co.* v. *Imbrovek,* 234 U. S. 52, 59, 60, we said, 'The work of a stevedore in which the deceased (Jensen) was engaging is maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction.' "

and referring to the *Rohde case, supra,* he said (p. 275):

"Neither the general employment contracted for nor the workman's activities at the time had any direct relation to navigation or commerce—it was essentially a local matter * * *."

In the case of

Millers' Indemnity Underwriters v. Braud, 270 U. S. 59,

the decedent, while employed as diver by a shipbuilding company, submerged from a floating barge

anchored in the navigable Sabine River in Texas, for the purpose of sawing off the timbers of an abandoned set of ways, formerly used for launching ships, which had become an obstruction to navigation. An award under the Texas Compensation Act was affirmed. The opinion of the lower court* points out the fact that the employment in this case was not maritime, as the abandoned set of ways at which decedent was working extended out from the shore and therefore in legal contemplation was a part of the land. It is clear that as the ways or piling on which decedent was working at the time existed only in that locality in the Sabine River and could not exist elsewhere, the application of the state act to his case could not possibly affect the uniformity of the general maritime law.

This Court refused a certiorari (270 U. S. 655) to the Texas Court of Civil Appeals in the case of

Southern Surety Co. v. Crawford, 274 S. W. 280 (1925),

in which the local act was applied upon a claim for compensation made by a deck hand upon a non-self-propelled dredge engaged in dredging an inland harbor channel. The facts as stated by the lower court clearly show why the matter was of mere local concern. That court said (p. 280):

"Here, under the unquestioned findings of the trial Court, the dredge was not a seagoing

* Millers' Indemnity Underwriters *v.* Braud, 245 S. W. 1025 (1922) (Texas Civ. App.).

vessel, nor even self propelled, but had to be towed everywhere; nor was it at the time of the casualty mediately or immediately engaged in navigation or commerce as such of any nature, being then located up in the Texas City channel in Galveston Bay within Galveston County, Texas, and actively at work dredging the channel at that local point."

The Court also said (p. 281):—

"The fact that the dredge was a floating one on navigable waters does not take this casualty out of the operation of the principle applied to these authorities, because the employment here—that of a deck hand on a non-self-propelled boat engaged in the improvement of a Texas inland harbor channel, even if maritime at all, is yet, within their meaning, to be deemed of such a local nature as not to materially affect any rules of the sea whose uniformity is essential."

In the case of *State Industrial Board* v. *Terry & Tench (supra),* it was evident from the facts as stated in the opinion of the New York Court, why the matter was of mere local concern. The claimant was injured while standing on a floating raft, employed in the construction of a pier in New York Bay. The floating raft was not a vessel which could be used in commerce, and the New York Court pointed out that while the claimant's injury was maritime, the contract of employment was not.

In the case of

Rosengrant v. Havard, 273 U. S. 664,

a decision of the Supreme Court of Alabama, sustaining an award of compensation under the state act, was affirmed in a *per curiam* opinion "on the authority of *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U. S. 469, and *Millers' Indemnity Underwriters* v. *Braud,* 270 U. S. 59."

The facts appear in the state reports: 211 Ala. 605, and 213 Ala. 202. Decedent's work was to tally and grade lumber as it was being unloaded from a barge into the defendant's planing mill, located on the bank of the Mobile River. Lashed to the barge was a schooner, also moored in the river. A tug boat was waiting nearby to tow away the barge when unloaded. Decedent was not doing any of the physical labor of moving the lumber, but was sitting on the schooner with pencil and book in hand tallying the lumber, when a bullet from a pistol in the hands of a man on board the tug boat struck him, as it was accidently discharged. The Court said (213 Ala. at p. 203):

> "Mr. Havard was not doing any of the physical labor of moving the lumber, and the service he was performing when shot could have been performed as well on the dock or wharf as on the barge or schooner."

The Court further said (p. 204):

> "This finding of the trial court (referring to the above mentioned facts) shows that the contract of employment and the services to be performed under it had no direct relation to navigation and that it was not a maritime contract."

In the case of

T. Smith & Son, Inc. v. Taylor, 276 U. S. 179,

a longshoreman, employed in the unloading of a vessel at dock, was standing upon a stage that rested solely upon the wharf and projected a few feet over the water toward the vessel. He was struck by a sling loaded with cargo which was being lowered over the vessel's side and was knocked into the water, where some time later he was found dead. This Court held that the award of compensation under the Louisiana Workmen's Compensation Law was proper because "The blow by the sling was what gave rise to the cause of action. It was given and took effect while deceased was upon the land" (p. 182).

The following language which appears on p. 181 of the opinion, again indicates the test applied by this Court in such cases:

> "Deceased was engaged in maritime work under a maritime contract. If the cause of action arose upon the river, the rights of the parties are controlled by maritime law, the case is within the admiralty and maritime jurisdiction, and the application of the Louisiana Compensation Law violated Section 2, of Article III (of the Federal Constitution). But if the cause of action arose upon the land, the state law is applicable."

In the case of

Alaska Packers Ass'n v. Industrial Accident Commission, 276 U. S. 467,

the claimant, while standing on the land in Alaska endeavored to push into navigable water a stranded

boat 26 feet long, in order that it might be floated to the dock nearby and lifted thereon, to be stored for the winter. While so engaged, the claimant sustained bodily injuries for which the California Industrial Accident Commission awarded compensation. The claimant had been employed to go to his employer's cannery in Alaska, and upon his arrival there, to do anything he was told to do. This Court said (p. 469):

> "Whether in any possible view the circumstances disclose a cause within the admiralty jurisdiction, we need not stop to determine. * * *. When injured certainly he was not engaged in any work so directly connected with navigation and commerce that to permit the rights of the parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law. The work was really local in character."

In the case of

Sultan Rwy. & Timber Co. v. Dep't of Labor, 277 U. S. 135,

it appeared that the Department of Labor of the State of Washington had issued an order directing the two plaintiffs in error to make reports and deposits as required by its Compensation Act. One of the complainants conducted logging operations and the work of its employees consisted of putting logs into booms after they had been thrown into a navigable river. The other claimant operated a sawmill on the bank of a navigable river and its

employees broke up the booms and guided the logs into the mill. In both instances, while the work in question was performed on a navigable river, it was done either before or after actual transportation. Clearly such work as above described had no relation whatsoever to navigation or commerce, and, in sustaining the judgment of the state court requiring the petitioners to make the reports and deposits required by the state workmen's compensation law, this Court said (p. 137):

> "It is settled by our decisions that where the employment, although maritime in character, pertains to local matters, having only an incidental relation to navigation and commerce, the rights, obligations and liabilities of the parties, as between themselves, may be regulated by local rules which do not work material prejudice to the characteristic features of the general maritime law or interfere with its uniformity."

Let us now consider the cases in which the facts were of such a nature as to constitute more than a matter of mere local concern, because they involved characteristic features of the general maritime law or affected the proper harmony and uniformity of that law in its international and interstate relations.

In the case of

Doey v. Howland, 224 N. Y. 30, 36 (1918),*

the claimant's employer had taken a contract for the repair of an ocean-going vessel while it was tied up at a pier in navigable waters. Claimant while

* Certiorari denied, 248 U. S. 574.

employed as a carpenter on board the vessel fell down a hatchway and sustained fatal injuries. The State Industrial Commission made an award of compensation but the Appellate Division reversed this award and the Court of Appeals affirmed its action, holding that as Doey was performing a maritime contract the Commission had no jurisdiction under the doctrine of the *Jensen case*. The Court said:

> "In the present case, upon the conceded facts, I am of the opinion that Doey was, at the time he met his death, engaged in the performance of a maritime contract. His employer had taken a contract to repair an ocean-going vessel, preparatory to its taking on a cargo of grain. Doey was one of several carpenters employed to make the necessary changes. He was, at the time he was killed, engaged in such work on a steamship then in navigable waters. The contract to make the changes was certainly maritime in its nature. Preparing a steamship to receive a cargo is as much maritime in nature as putting the cargo on or taking it from the ship. Nor was the nature of the contract changed in any way because the contractor did not actually do the work himself, but employed others to do it for him. Doey's contract of employment was just as much of a maritime nature as was that of his employer."

In the case of

Great Lakes Dredge & Dock Co. v. Kierjewski, 261 U. S. 479,

the decedent, a master boiler maker employed by the appellant, was engaged in making repairs upon

a scow moored in the navigable waters of Buffalo River. During the course of said employment the float upon which he was working was negligently swamped and he was precipitated into the river where he drowned. The question on appeal was whether the District Court had jurisdiction to entertain the libel by which the defendant in error sought to recover damages for the death of her husband. This Court held that such jurisdiction was properly exercised by the District Court, and in referring to the *Rohde case* said (pp. 480-81):

> "In the cause last cited neither Rohde's general employment nor his activities had any direct relation to navigation or commerce—the matter was purely local—and we were of opinion that application of the state statute, as between the parties, would not work material prejudice to any characteristic feature of the general maritime law or interfere with its proper harmony or uniformity.
>
> "Here the circumstances are very different. Not only was the tort committed and effective on navigable waters, but the rights and liabilities of the parties are matters which have direct relation to navigation and commerce. *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205; *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255; *State Industrial Commission of New York* v. *Nordenholt Corporation*, 259 U. S. 263."

In the case of

Gonsalves v. Morse Dry Dock & Repair Co., 266 U. S. 171,

the claimant also at the time of the accident was engaged in repairing a steamship resting in a floating dock in navigable waters at Brooklyn. He was injured while on board the vessel "through the explosion of a blau torch." A libel in admiralty had been dismissed by the District Court for want of jurisdiction. The decision was reversed by this Court on appeal, on the ground that the matter was clearly within the admiralty jurisdiction.

In the case of

Robins Dry Dock & Repair Co. v. Dahl, 266 U. S. 449,

it appeared that Dahl was doing repair work on a steamer lying in navigable waters in Brooklyn. A scaffold on which he was working broke and caused him to fall into the hold. The lower Court in its charge attempted to apply a rule of evidence created by a New York Statute. This Court held that was error and said (p. 457):

> "The rights and liabilities of the parties arose out of and depended upon the general maritime law and could not be enlarged or impaired by the state statute."

and in distinguishing the *Rohde case,* said (p. 457):

> "The alleged tort was maritime, suffered by one doing repair work on board a completed vessel. The matter was not of mere local concern, as in *Grant Smith-Porter Company* v. *Rohde,* 257 U. S. 469, 476, but had direct relation to navigation and commerce, as in *Great Lakes*

Dredge & Dock Co. v. *Kierjewski,* 261 U. S. 479. The rights and liabilities of the parties arose out of and depended upon the general maritime law and could not be enlarged or impaired by the state statute."

The facts involved in the case of

Messel v. Foundation Co., 274 U. S. 427,

are quite similar to the facts in the case at bar. Messel was employed by the Foundation Company as helper to a boiler maker. He was sent with the boiler maker on board a steamship then afloat on the Mississippi River at New Orleans. The task to be performed was to add eight feet to the steamer's smoke stack. While engaged in this work Messel was brought directly over the mouth of the steam escape pipe running from the engine room. The escaping steam from the pipe inflicted the injuries upon him.

He filed a petition in the state Court under a certain section of the Louisiana Civil Code and also claimed, in the alternative, under the local workmen's compensation act if it could constitutionally apply. The state courts held that in view of the decisions of this Court in the Jensen and other cases, the workmen's compensation act could not be applied, and further held that as that Act was made exclusive by its terms there could also be no recovery under the section of the Civil Code referred to.

In reversing the decision of the state courts, this Court held that although on the facts involved the

local workmen's compensation act could not be applied, yet the claimant might sue under the state Civil Code, as such remedy was expressly saved by Section 9 of the Judiciary Act, and that the principles applicable to a recovery in the state court, of course (p. 434): "must be limited to those which the admiralty law of the United States prescribes, * * *."

Mr. Chief Justice Taft, speaking for this Court, said (p. 434):

> "As Messel has resorted to the state court, and there is nothing to prevent his recovery in the state court except the Workmen's Compensation Act, which is inapplicable to his case in view of our decisions, the judgment of the Supreme Court of Louisiana must be reversed. * * *"

Mr. Chief Justice Taft also indicated in this opinion the kind of situation which is not a matter of mere local concern when he interpreted the doctrine of the *Jensen* and other cases as holding (pp. 431-2):—

> "* * * that a Workmen's Compensation Act could have no application to an injury to one working as an employee on a vessel afloat on the waters of the United States, where his work was upon a maritime contract and the rights and liabilities of the parties were matters clearly within the admiralty jurisdiction, * * *."

The facts appearing in the foregoing case, which in their important features are almost exactly identical with the facts of the case at bar, were therefore definitely considered by this Court as constituting more than a matter of mere local concern so that the

local workmen's compensation act was inapplicable in view of the former decisions of this Court.

In the case of

Northern Coal & Dock Co. v. Strand, 278 U. S. 142; 73 L. ed. 99 (supra),

the employer, as appears from the recital of facts contained in the concurring opinion of Mr. Justice Stone, was a wholesale coal dealer. It neither owned nor controlled any ships and had no connection with maritime affairs except that it owned a dock at which coal was delivered to it from time to time from ships. The regular work of the decedent, an employee of the coal company, was non-maritime and he spent only two per cent. of his time helping to unload his employer's coal from the vessels. While on board a steamer, assisting in the discharge of her cargo of coal, he was struck by the clam-shell and instantly killed.

A claim for compensation under the Wisconsin Act was filed, and an award was made. The decision of the Supreme Court of Wisconsin affirming that award was reversed by this Court. The facts which made the cause of action maritime and prevented the application of the local workmen's compensation act are stated by Mr. Justice McReynolds in the following language (p. 144):

> "Strand's employment contemplated that he should labor both upon the land and the water. When killed he was doing longshore or stevedore work on a vessel lying in navigable waters, according to his undertaking. His employment,

so far as it pertained to such work, was maritime; the tort was maritime; and the rights of the parties must be ascertained upon a consideration of the maritime law * * *.

"The unloading of a ship is not matter of purely local concern. It has direct relation to commerce and navigation, and uniform rules in respect thereto are essential. The fact that Strand worked for the major portion of the time upon land is unimportant. He was upon the water in pursuit of his maritime duties when the accident occurred."

The opinion proceeded to hold that the claimant at the time of his death was a "seaman" within the intendment of the Jones or Merchant Marine Act;* that Section 33 of that Act incorporated the Federal Employers Liability Act into the maritime law of the United States; that the rights and remedies afforded by that act were exclusive; and that as Congress had provided a remedy to secure damages resulting from death, no state statute could provide any other or different one.

The most recent reported case of this nature is the case of

London Guarantee & Accident Co. v. Industrial Accident Commission, 73 L. ed. 368; (U. S. Supreme Court Advance Opinions May 1, 1929).

An award had been made by the Industrial Accident Commission of California, and affirmed by the

* Act of June 5, 1920, 41 Stat. at L. 1007, c. 250 (U. S. C. Title 46, Section 688).

Supreme Court of California, for the death of an employee of The Morris Pleasure Fishing, Inc. This company owned a number of small fishing vessels equipped with gas engines used for the accommodation of the public seeking recreation in deep-sea fishing, and the decedent was employed as a skipper to assist with the navigation of these vessels. The boats were capable of cruising a distance of 500 miles but made regular daily excursions of from three to five miles. One of the boats broke from her moorings during a storm, and decedent in an effort to save it put off from shore in an 18 foot boat, which capsized, resulting in the drowning of the decedent.

The Industrial Commission contended, *inter alia,* that the matter was one of local concern which did not affect commerce or navigation, that the vessel in question was not engaged in interstate or foreign commerce, and that it had jurisdiction to make an award under the state Compensation Act.

Mr. Chief Justice Taft, speaking for the majority of this Court reviewed all the cases on the subject and said (p. 373):

> "The conclusion sought to be drawn by counsel for the Commission from the Rohde and other cases is that workmen's compensation acts will apply unless their application would interfere with the uniformity of the general maritime law in interstate and foreign commerce, and there is neither here. But this omits one of the grounds for making an exception—that it shall not be prejudicial to the characteristic features of the

maritime law. That is just what it would be here, for here we have a transaction on the navigable waters of the United States which in every respect covers all the characteristic features of maritime law and has no other features but those. To apply to such a case a state compensation law would certainly be prejudicial to those features."

While this Court has unquestionably established a definite principle to the effect that no matter is of mere local concern which involves characteristic features of the general maritime law or affects the proper harmony or uniformity of that law in its international and interstate relations, it has not, of course, attempted in any case to indicate and define by an all-inclusive rule what facts or groups of facts make a case one of mere local concern.

A consideration of the foregoing cases however, and a comparison of the facts in the cases where a state act has been applied because the matter was local, with the cases in which the application of a state act has been denied, will serve to indicate clearly what facts are significant and controlling. Certainly if any class of cases has been established as of more than local concern, to which a state workmen's compensation act cannot apply, it is the class of cases in which there concur: (1) the fact that the employment was maritime; (2) the fact that the claimant, at the time of the injury, was working on board a vessel lying in navigable waters; and (3) the fact that at the time the injuries were sustained, his activi-

ties had direct relation to navigation and commerce, for example, the unloading of a vessel or repairing a vessel.

POINT B.

The Pennsylvania Workmen's Compensation Act, as construed by the Supreme Court of Pennsylvania to be applicable to regulate the rights and remedies of the appellee, a workman injured while engaged in performing repairs to and upon a steamship lying in navigable waters, is unconstitutional.

This case has now been considered by five different tribunals, to-wit, the Referee, the Workmen's Compensation Board, the Court of Common Pleas of Philadelphia County, the Superior Court of Pennsylvania and the Supreme Court of Pennsylvania, and although each has held the local compensation law applicable, each decision has been based upon entirely different reasoning than those preceding it. **Indeed each successive decision has either ignored or expressly disapproved the reasoning of its predecessors.**

The decision of the Referee was based upon a gratuitous finding, without a shred of evidence to support it, that the steamship "Bald Hill" was "out of commerce" at the time the claimant was injured. We do not know, in view of the facts in this case and the decisions in similar cases, what the Referee meant by the phrase "out of commerce," or what legal significance he attached to it. If he meant by the phrase that at the time the repairs were being performed, the vessel was not actually *en voyage,* he,

of course, stated a truth, but that statement had no legal significance. If he meant that because the vessel was not actually *en route* from one port to another when the injuries were sustained, but was tied up at a pier undergoing repairs, the vessel was for that reason not subject to the jurisdiction of the admiralty and maritime law, he was clearly wrong: *The Robert W. Parsons,* 191 U. S. 17; *Robins Dry Dock & Repair Co.* v. *Dahl,* 266 U. S. 449 (*supra*); *New Bedford Dry Dock Co.* v. *Purdy,* 258 U. S. 96.

Indeed, as was stated in the opinion of the Supreme Court of Pennsylvania (R. 21): "The referee's statement that the vessel was out of commerce is in itself inconsistent with the finding that the vessel 'had steamed to Philadelphia to have certain repairs made.'"

The reasoning upon which the decision of the Workmen's Compensation Board is based is rather obscure. After resorting to Webster's International Dictionary for a definition of the limits of admiralty jurisdiction, and quoting definitions of the term "seaman" from various text books and statutes, the opinion cites the *Rohde case,* without indicating the basis of its alleged applicability to the instant case, and then seems to rely upon the reasoning of an English case which argued that "so far as concerns a man working on a ship, if the ship is in a dock, the dock being a factory, the ship is in a factory, and therefore a man working on the ship is working in a factory."

The Court of Common Pleas of Philadelphia County thought that the issue in this case depended upon the distinction between accidents happening to one while working on or with things which are in actual use as instrumentalities of both interstate and intrastate commerce, and those occurring to persons while employed or working on things then being put in position for such common use in the future. That court saw no significance in the *Jensen case,* the *Nordenholt case* and the *Knickerbocker case,* saying that they threw no light on the subject under discussion.

The decision of the Superior Court of Pennsylvania, as has been noted, was based upon the alleged distinction between a compulsory workmen's compensation act and an elective compensation act.

The opinion of the Supreme Court of Pennsylvania points out the fallacy of the Superior Court's reasoning, and then, other reasons for applying the state workmen's compensation act having failed, it proceeds to invent and advance entirely new theories for evading the application of the uniformity doctrine and sustaining the jurisdiction of the state act. This opinion shows either that the ingenuity of the opponents of the uniformity doctrine is not yet exhausted, or that the Supreme Court of Pennsylvania, in considering at length the various decisions of this Court, entirely ignored the *ratio decidendi* of the cases to which it referred.

The contentions of the Pennsylvania Supreme

Court upon which its decision is based, are that under the circumstances in the case at bar the parties had "contracted with reference to the state statute," that the appellee's activities at the time his injuries were sustained had no direct relation to navigation and commerce, that the rule of the *Jensen case* does not apply unless the claimant's general and regular employment was maritime, which was alleged not to be the case here, and that the rule of the *Jensen case* does not apply where the injuries were purely accidental and not the result of a tort, which was alleged not to exist in the case at bar.

I. The parties in the case at bar are not "clearly and consciously within the terms of the state statute," and they did not contract with reference thereto.

The Workmen's Compensation Act of Pennsylvania (June 2, 1915, P. L. 736, Article III, Section 301), in force at the time appellee's injuries were sustained, provides:

> "When employer and employee shall by agreement, either express or implied, as hereinafter provided, accept the provisions of article three of this act, compensation for personal injury to, or for the death of, such employee, by an accident, in the course of his employment, shall be made in all cases by the employer, without regard to negligence * * *."

Section 302 (*a*) provides:

> "In every contract of hiring * * *, it shall be conclusively presumed that the parties have

accepted the provisions of article three of this act, and have agreed to be bound thereby, unless there be, at the time of the making, renewal, or extension of such contract, an express statement in writing, from either party to the other, that the provisions of article three of this act are not intended to apply, and unless a true copy of such written statement, accompanied by proof of service thereof upon the other party * * * be filed with the Bureau within ten days * * *."

Under the provisions of Section 305 of said act (as amended by the Act of April 7, 1921, P. L. 114, No. 67, Section 1) an employer is not required to contribute to the State Workmen's Insurance Fund, but may insure in any insurance company authorized by the Commonwealth to insure such liability, or may, upon satisfactory proof of financial condition, obtain a certificate of exemption from the obligation to insure. Employees are not under any circumstances obliged to contribute to the said Insurance Fund.

The opinion of the Supreme Court of Pennsylvania states (R. 35):

"This contractor, third-party employer, and the plaintiff had agreed between themselves that, in case of injury to the latter during the course of his employment, he would be entitled to compensation according to a schedule in the state compensation act. Here, as much as in the *Rohde case,* we think it can be said, 'the parties, plaintiff and defendant, contracted with reference to the state statute' * * *."

The record discloses no such agreement between the parties, other than the agreement implied and imposed upon the parties by the foregoing provisions of the act. There was no contribution by both or either of the parties to the Insurance Fund. Under these circumstances the Court's conclusion that "Here, as much as in the *Rohde case,* we think it can be said 'the parties, plaintiff and defendant, contracted with reference to the state statute,' " is clearly based upon a misconception of the significance of that statement in the *Rohde case.*

Mr. Justice McReynolds said in the *Rohde case* (p. 476): "And as both parties had accepted and proceeded under the statute by making payments to the Industrial Accident Fund it cannot properly be said that they consciously contracted with each other in contemplation of the general system of maritime law." And again (p. 477): "Here the parties contracted with reference to the state statute; * * *."

In *Millers' Indemnity Underwriters* v. *Braud (supra),* Mr. Justice McReynolds, referring to this statement in the *Rohde case,* said (p. 64):

> "Stressing the point that the parties were clearly and consciously within the terms of the statute and did not in fact suppose they were contracting with reference to the general system of maritime law, we alluded to the circumstance, not otherwise of special importance, that each of them had contributed to the industrial accident fund."

Attempts have been made, as was made in the case at bar, to clothe with some mysterious significance the statement that in the *Rohde case* the parties were "clearly and consciously within the terms of the statute." Certainly no mystery is involved in the phrase. The parties were *clearly* within the terms of the statute because the contract was non-maritime, and they were *consciously* within its terms because each of them had contributed to the industrial accident fund.

In the case at bar the parties, upon the facts and the authorities, were neither clearly nor consciously within the terms of the state statute, nor can it be said that they contracted with reference thereto. It was held in

Union Fish Co. v. Erickson, 248 U. S. 308, 313,

that when entering into maritime contracts the parties contemplate the system of maritime law and its well known rules control their rights and liabilities to the exclusion of state statute: *State Industrial Commission* v. *Nordenholt Co.,* 259 U. S. 263, 274 (*supra*).

The contract of the appellant John Baizley Iron Works to repair the steamship "Bald Hill" was a maritime contract; appellee's contract of employment in so far as it required him to assist in making such repairs was also maritime. The parties therefore were *clearly* not within the terms of the state statute with reference to such work, and as to such work did not contract with reference thereto. And

they were not *consciously* within its terms because neither contributed to the state insurance fund.

II. The terms of the general contract of employment between the parties are unimportant.

Another contention which appears throughout the opinion of the Supreme Court of Pennsylvania, as one of the bases of the decision, is that "there is nothing here to show the scope of Span's general employment contemplated maritime work * * *" (R. 21). It is said (R. 24):

> "For the present, it is enough to note that the record now before us does not show any contract of general employment between plaintiff and defendant Iron Works, nor suggest that Span was originally engaged on, in or about ships. Apparently he was a land man, under a land contract of employment; * * * whereas, in each of the four cases just reviewed, the injured person was employed by a concern directly and apparently exclusively, engaged in maritime work, and the records there involved indicate or strongly suggest that his original employment contemplated work having some direct relation to navigation or commerce."

While it is true that the record of the testimony given before the Referee is silent as to the nature of the general employment between appellee and appellant Iron Works, and the nature of the general activities both of the employer and the employee, it is also true that the Court's assumption that "apparently he (appellee) was a land man, under a

land contract of employment" is wholly gratuitous and is based upon nothing in the record.

The best evidence that Span's original employment contemplated maritime work is the fact that he was actually on shipboard, engaged in such work at the time his injuries were sustained. That the work which Span was doing at the time was within the scope of his general employment must necessarily have been found by all of the Pennsylvania courts, otherwise the award could not have been sustained.

Furthermore, the statement is unimportant and has no legal significance. If the appellee, at the time his injuries were sustained, was employed on shipboard in work of a maritime nature and his activities had direct relation to navigation and commerce, a state compensation act cannot be applied even though his general employment and usual activities may not have been maritime. In

Northern Coal & Dock Co. v. Strand, 278 U. S. 142 (supra),

the same contention was made. The employer was a wholesale coal dealer, which had no connection with maritime affairs except that coal was delivered to it from time to time in ships. Mr. Justice Stone said in the concurring opinion (p. 148): "The employee's regular work was non-maritime and he spent but two per cent. of his time [approximately one day every two months] unloading his employer's coal from ships." Commenting upon these facts, the majority opinion states (p. 144):

> "The fact that Strand worked for the major portion of the time upon land is unimportant. He was upon the water in pursuit of his maritime duties when the accident occurred."

III. Span's activities at the time his injuries were sustained had direct relation to navigation and commerce.

As is indicated by the foregoing quotation from the Strand case, the important question concerning the claimant's work is not its general scope but the nature of his activities at the time the injuries were sustained. The opinion of the Supreme Court of Pennsylvania admits (R. 35) that this is an important factor in ascertaining whether a state compensation act may be applied in a particular case, but then proceeds to hold that in the case at bar, Span's activities at the time of the accident had no direct relation to navigation or commerce. The opinion states (R. 33):

> "We may here remark that, while the kind of work plaintiff in the present case was doing at the time of his injury might be said to have a certain remote relation to navigation and commerce, yet it seems to us that such work cannot be held to bear any 'direct' relation to those subjects."

and after reviewing the authorities, the Court concluded (R. 36):

> "In the cases which we have discussed, where admiralty took jurisdiction to the exclusion of

> the local law, the injury occurred while the person in question was engaged in activities which had a much plainer and more direct relation to navigation than the work of the present claimant."

We submit that certainly no activities of any nature can have a more direct relation to navigation and commerce than the performance of repairs to a vessel. The Pennsylvania Supreme Court attempts to exclude from a consideration of this question the *Jensen case* and other so-called "stevedore cases" (R. 25-6), on the ground that they are *sui generis.* The activities of a stevedore on board a vessel are unquestionably maritime: *Atlantic Transport Co.* v. *Imbrovek,* 234 U. S. 52, 62; *International Stevedoring Co.* v. *Haverty,* 272 U. S. 50, 52. A stevedore is a porter engaged in carrying, loading and unloading a vessel's cargo. His general activities are not inherently maritime; the important features of his labor, in this connection, are that his work is performed on shipboard, and that it relates to the vessel's cargo. Similarly, although the work of a carpenter, boilermaker or blacksmith is not inherently maritime, the activities of such mechanics when engaged in making repairs to and upon a vessel, certainly have no less a direct relation to navigation and commerce than the activities of a stevedore.

We need but refer to a few of the cases to show that this Court has never made such a distinction. In the case of *Great Lakes Dredge & Dock Co.* v.

Kierjewski (supra), the claimant was a boilermaker, engaged in making repairs to a vessel in navigable waters.

In *Gonsalves* v. *Morse Dry Dock Co. (supra)* and in *Robins Dry Dock & Repairs Co.* v. *Dahl (supra),* the precise kind of work being performed by the respective claimants does not appear, other than that each was doing "repair work" upon a vessel lying in navigable waters.

In *Messel v. Foundation Co. (supra),* the claimant was a boilermaker's helper. He and the boilermaker were adding eight feet to the smokestack of the vessel when the injuries were sustained. Just what Messel was doing to assist in the work at the time does not appear, nor does it seem to have been considered material.

In *March* v. *Vulcan Iron Works (supra),* the employee was a foreman of a boiler shop and was attempting to board the vessel for the purpose of inspecting its boilers when his injuries were sustained.

In *Doey* v. *Howland (supra),* the employee was a carpenter, engaged in making repairs to the vessel when he was killed.

In *Danielsen* v. *Morse Dry Dock & Repair Co. (supra),* the claimant had been employed as a "burner" and was engaged in burning the bolts and metal plates at the time his injuries were sustained.

In the case at bar, the appellee, Span, was employed as a blacksmith's helper (R. 8). In his claim petition

he stated (R. 2) that he was painting the angle irons on board ship at the time of the accident, and he testified before the Referee (R. 4) that he "was painting the iron in the engine room." He further stated in his claim petition (R. 2) that another employee of the John Baizley Iron Works "was cutting iron with an acetylene torch," and testified (R. 5) that he called to this fellow employee and told him "to burn the iron on the other side," and that in so doing the sparks from the acetylene torch entered his eye.

We submit that the activities of this appellee, both upon the facts and upon the authorities, had as direct a relation to navigation and commerce as the activities of any of the claimants in the above mentioned cases. Can a distinction be made between the painting of a ship's boiler and other repairs thereto, such as the replacing of a section? Who can say that the painting of a boiler so as to preserve it and enable it to function properly on the voyage is any less important or bears any less direct a relation to navigation and commerce than, for example, replacing a section of the boiler so as to preserve it and enable it to function properly?

IV. The fact that Span's injuries may not have been due to a tort, is no reason for permitting the application of the local act.

Although the opinion of the Pennsylvania Supreme Court dwells upon the matters above discussed, the

ratio decidendi, if there be one, will be found, we believe, in the Court's statement that Span's injuries were not the result of a tort. The opinion states (R. 36-7):

> "Moreover, in each of those cases [discussed in this opinion] the injuries resulted from a maritime tort—that is, a wrongful act committed on the high seas or on navigable waters: * * * in all the federal cases where admiralty relief was afforded to physically injured persons who were not members of the crew of or constantly attached to the ship on which they were hurt, the injuries were attributable to a maritime tort—a fact emphasized in each instance * * *. Here, as previously stated, no tort was committed; so far as the record indicates, the injury to plaintiff was purely accidental. Under these circumstances, since plaintiff cannot in any proper sense be classed as a seaman, entitled in admiralty to a measure of relief for accidental injuries (see *The Osceola,* 189 U. S. 158), to refuse application of the local compensation law would in effect deprive him of all relief."

Before passing to a consideration of the legal aspects of this argument, we wish to observe that the Court's statement to the effect that no tort was committed in this case is not based upon any finding of fact by the Referee, nor upon affirmative testimony **The existence or non-existence of a tort was conceived to be wholly immaterial in the proceedings before the Referee and no effort therefore was made either by appellee or by appellants to establish it.**

The only testimony as to the manner in which the accident occurred is found in the statement of the claimant (R. 5) that "as soon as he put the torch to the iron why the flame caught me in the eye." Whether the injuries were due to improper or careless operation of the acetylene torch, or to the fact that the torch was not in good condition, does not appear. Upon this state of the record, however, the Pennsylvania Supreme Court **affirmatively** finds that no tort was committed, and upon such a finding bases its conclusion that the application of the local law will not impinge upon admiralty jurisdiction.

The argument is obviously *ad hominem*, and blandly ignores the legal principles upon which the issue before the Court must be decided. The issue is not whether a remedy is afforded under the maritime law, but whether a state has power to enact legislation which grants to its tribunals jurisdiction over a maritime cause such as is here disclosed. Certainly the many cases which have been considered by this Court since the *Jensen case*, do not turn upon a mere question of fact, whether the injuries in each case were the result of a tort or were purely accidental.

As was said by this Court in the *Jensen case (supra)* at pp. 216-17:

> "A similar rule in respect to interstate commerce deduced from the grant to Congress of power to regulate it is now firmly established. 'Where the subject is national in its character, and admits and requires uniformity of legislation, affecting alike all the States, such as trans-

> portation between the States, including the importation of goods from one State into another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free.' *Bowman* v. *Chicago & Northwestern Ry. Co.*, 125 U. S. 465, 507, * * *. And the same character of reasoning which supports this rule, we think, makes imperative the stated limitation upon the power of the States to interpose where maritime matters are involved."

A final, and, we believe, conclusive answer to this position of the Pennsylvania Supreme Court is the fact that in most of the cases wherein this Court has held inapplicable a local workmen's compensation act because it trenched upon the general maritime law, there was no evidence of the commission of a tort.

In the *Jensen case (supra)*, the claimant's duties were to operate a truck which was used in removing the cargo from the vessel to the pier. In driving out of the port in the side of the vessel and upon the gangway, the truck became jammed against the guide pieces of the gangway. Jensen then reversed the direction of the truck and proceeded backward into the hatchway. He failed to lower his head, which struck the top of the hatchway, throwing his head forward and breaking his neck. That there was no tort committed by or attributable to the defendant in this case appears not only from the foregoing recital of the facts, but also from the following statement

appearing in the dissenting opinion of Mr. Justice Holmes (p. 219):

> "And as such a liability [created by the New York Workmen's Compensation Act] can be imposed where it was unknown not only to the maritime but to the common law, I can see no difference between one otherwise constitutionally created for death caused by accident and one for death due to fault."

In the case of

Clyde Steamship Co. v. Walker, 244 U. S. 255,

which involved the same statute considered by this Court in the *Jensen case,* on substantially the same facts, it appeared (p. 257) that Walker, a stevedore, was hooking the rope of a derrick into a load of lumber in the between decks of the vessel for the purpose of unloading it, when his hand became jammed against the lumber, resulting in the injuries upon which the claim was based. Here also the record does not disclose a tort committed by the defendant.

In the case of *Knickerbocker Ice Co.* v. *Stewart (supra),* the only statement of the facts relating to the accident which appeared to this Court to be material is the statement (p. 155): "While employed by Knickerbocker Ice Company as bargeman and doing work of a maritime nature, William M. Stewart fell into the Hudson River and drowned." No tort is disclosed by that statement.

The facts involved in the case of *James Rolph Co.*

v. *Industrial Accident Commission (supra)*—considered by this Court in the case of *Washington* v. *Dawson (supra)*—appear in the State Report. The claimant was a stevedore, engaged in helping to unload a shipment of coal consigned to his employer. Before going below to the hold where he was required to work, he secured an iron plate used in the unloading process, and in attempting to throw the plate below, overbalanced and fell into the hold, sustaining injuries from which he died. These facts disclose no tort on the part of the employer.

That the decisions of this Court in *Washington* v. *Dawson* and other cases do not in any sense depend upon the existence or non-existence of a tort further appears from the case stated in the dissenting opinion of Mr. Justice Brandeis in *Washington* v. *Dawson,* which sets forth his interpretation of that decision. He states (p. 228):

> "A concern, doing a general upholstering business in New York, directs one of its regular employees, resident there, to make repairs on a vessel lying alongside a New York dock. The ship, then temporarily out of commission, is owned and enrolled in New York, and when used is employed only within the State. While on the vessel engaged in making the repairs, the employee is injured without the fault of any one and is disabled for life * * *."

In *London Guarantee & Accident Co.* v. *Industrial Accident Commission (supra),* the decedent was drowned when the boat in which he was riding was

capsized by a heavy wave. Certainly there was no tort attributable to the employer in this case.

In *March* v. *Vulcan Iron Works (supra),* the deceased, a foreman in the defendant's boiler shop, was climbing a ladder from the deck of the dry dock to the deck of the vessel when he fell to the deck of the dry dock and was killed. Here, also, no tort attributable to the employer was disclosed.

In all of the foregoing cases it was held that a state Workmen's Compensation Act could not be applied to regulate the rights and remedies of the parties notwithstanding the fact that in none of them was there disclosed a tort attributable to the employer. There would seem to be no doubt therefore that the question whether a Workmen's Compensation Act may change, modify or otherwise impinge upon the general maritime law, cannot be made to depend upon the existence or non-existence of a tort attributable to the employer.

Indeed, the argument of the Pennsylvania Supreme Court to the contrary, in view of the foregoing decisions, is incomprehensible. The cases which it cites in support of its minor premise have no relation to the problem which the court attempts to solve by its syllogistic reasoning. The *Imbrovek case,* the *Kierjewski* and the *Gonsalves cases* arose upon libels in admiralty based upon alleged tort. The existence or non-existence of a tort was material in ascertaining whether or not the maritime law afforded a remedy. But the fact that the existence or non-

existence of a tort was material in those cases is obviously of no significance in determining whether a State has the power to enact a Workmen's Compensation Law which confers upon its tribunals jurisdiction over a maritime cause.

CONCLUSION.

The doctrine of uniformity in admiralty and maritime matters enunciated by this Court, construes the federal constitution to forbid any state legislation which works material prejudice to any characteristic feature of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This doctrine remains unimpaired notwithstanding the numerous assaults upon it, and the efforts of its opponents to evade and circumvent it.

As a necessary and logical corollary to the doctrine, in matters of mere local concern, a state workmen's compensation act may apply to a situation which is otherwise maritime, for if the situation be one of mere local concern, *ex hypothesi* the application thereto of a state workmen's compensation act will not work material prejudice to any characteristic feature of the general maritime law, nor interfere with that law in its international and interstate relations.

But no case in which there concur the facts that an employee was working under a maritime contract, that his activities at the time he was injured had

direct relation to navigation and commerce, and that he was injured while engaged in such activities on board a vessel lying on navigable waters, presents a matter of mere local concern.

The Supreme Court of Pennsylvania has held that the rights and remedies in the case at bar must be regulated by the Pennsylvania Workmen's Compensation Act, although the parties did not contract with reference to the state statute, although the appellee at the time his injuries were sustained was engaged in maritime employment on board a vessel lying on navigable waters, and although his activities at the time had direct relation to navigation and commerce. As so applied, the Pennsylvania act works material prejudice to characteristic features of the general maritime law, and is therefore unconstitutional.

We, therefore, respectfully submit that this decision of the Supreme Court of Pennsylvania should be reversed.

OWEN J. ROBERTS,
Counsel for Appellants.

CHARLES A. WOLFE,
ROBERTS & MONTGOMERY,
Of Counsel for Appellants.

FILE COPY

MAY 9 1
CHARLES ELMORE

No. [redacted]. 62 October Term, 1928.

IN THE

Supreme Court of the United States

JOHN BAIZLEY IRON WORKS and THE OCEAN ACCIDENT & GUARANTEE CORPORATION, Limited,

Appellants,

v.

ABRAHAM SPAN,

Appellee.

On Appeal from the Supreme Court of the Commonwealth of Pennsylvania.

Appellee's Reply to Statement as to Jurisdiction on Appeal.

WILLIAM J. CONLEN,
Counsel for Appellee.

International, 236 Chestnut St., Philadelphia

IN THE

Supreme Court of the United States.

October Term, 1928. No. 810.

JOHN BAIZLEY IRON WORKS AND THE OCEAN ACCIDENT & GUARANTEE CORPORATION, LIMITED,

Appellants,

v.

ABRAHAM SPAN,

Appellee.

APPELLEE'S REPLY TO STATEMENT AS TO JURISDICTION ON APPEAL.

The appellee in reply to appellants' statement of the jurisdiction of this Court, respectfully represents that an examination of the Record discloses no question of a Federal nature involved so as to give this Honorable Court jurisdiction of this cause:

The appellee, injured in the course of his employment by John Baizley Iron Works, sought an award under the Pennsylvania Workmen's Compensation Act (Act of June 2, 1915, P. L. 736, as amended) and an award of compensation in appellee's favor was made by the Referee. (R., 17, 18.) [1]

The award of the Referee was sustained on various appeals by the Workmen's Compensation Board (R., 23),

[1] As in appellants' statement as to jurisdiction on appeal, all references to the record are to the certified unprinted record on file with the Clerk of this Court.

the Court of Common Pleas No. 4 of Philadelphia County (R., 29), the Superior Court of Pennsylvania (R., 32), and the Supreme Court of Pennsylvania (R., 55).

Reasons for contention of lack of jurisdiction:

I. Record Does Not Disclose Federal Question;

II. Jurisdiction of State Court May be Affirmed on Non-Federal Grounds;

III. Recent Prior Decisions of this Court Govern This Case in Favor of Appellee:

I. The only reference to a Federal question before the Referee, was by a representative of the insurance carrier, made while appellee was under cross-examination—"Mr. Referee, I question the authority of this court on this case, coming under the Maritime Act, he was working on shipboard and the ship was commissioned in Commerce, being repaired." (R., 14.)

The record indicates only that at the time of the injury the appellee was employed by the John Baizley Iron Works, as a blacksmith helper (R., 7, 15); the record does not disclose that John Baizley Iron Works was engaged in repairing the steamship "Bald Hill," or that it ever before had, or would ever again have employees employed on navigable waterways. The record only shows that the John Baizley Iron Works was an *iron works* (R., 7); that appellee was injured on board a ship which was being repaired (R., 14); and that appellee at the time of injury was painting angle irons (R., 9, 10, 15).

Nowhere in the record does it appear that appellee was employed to work as a marine repairman, that he regularly so spent even a portion of his time, that he had ever before or would ever again be employed in such an occupation, or intended to be employed in any work of a maritime character or on navigable waters.

The record shows that appellee was not a regularly employed worker on navigable waters—

"Q. What particular work were you doing on that day?

"A. I was painting the iron in the engine room.

"Q. Tell the Referee what happened to you on January 13th.

"A. We came in the morning to work.

"Q. Just before this accident occurred to you, what were you doing?

"A. We worked in the boiler shop.

"Q. On this particular day you were working on this ship?

"A. Yes." (R., 9.)

There is nothing in the record to indicate that the vessel on which the injury occurred was an instrument of commerce. In fact, the Referee found that the ship was "Out of commerce." (R., 16.) There is no testimony that it was ever so engaged except the inferences to be drawn by the statement of the Referee and the stipulated statement of facts on appeal to the Supreme Court of Pennsylvania, that it had steamed into Philadelphia, and was undergoing repairs. (R., 16, 34.)

Upon such a record, appellants contend that a Federal question is involved, because the validity of the application of the Workmen's Compensation Act has been called in question under the Constitution of the United States.

The situation presented is that of an employee, not regularly employed on a navigable waterway in work of a maritime character, who is not shown to have been engaged at the time of accident in work of a maritime character for his employer, whose employer is not shown to be under any contract to repair the vessel on which the injury occurred or perform any work of a maritime character, and one where the appellant is not the employer but an insurance carrier directly liable to the appellee under the terms of a State statute.

II. The action of the State Court may be affirmed on non-Federal grounds, and, therefore, its judgment should be affirmed.

Appellants and appellee both accepted the provisions of the Pennsylvania Compensation Act and intended to be thereby bound This appears from the findings of the Referee (R., 15, 17) and the opinion of the Superior Court (R., 31). The Referee concluded that both parties were bound by the Act in accordance with the contract made between them, and made an award against the insurer, Ocean Accident & Guarantee Corporation, Ltd., but made no award against the employer, John Baizley Iron Works (R., 17, 18). See also opinion of Superior Court (R., 31). Therefore, the question of the liability of the appellant, John Baizley Iron Works, is moot and its appeal should be dismissed.

The appellant, Ocean Accident & Guarantee Corporation, Ltd., was found by the Referee to have contracted with the provisions of the Voluntary State Compensation Act in view (Opinion of Superior Court, R., 31). Having so contracted it is estopped to deny the constitutionality of the act.

Under the Pennsylvania Workmen's Compensation Act, which is an elective act similar to the Oregon Statute before this court in Grant Smith-Porter Co. v. Rohde (257 U. S., 469 (1921)), an insurance carrier is directly liable to the insured employee (Act of June 2, 1915 P. L. 769, Sec. 1, as supplemented by Act of June 26, 1919 P. L. 642, Sec. 401, Art. IV, P. L. 659, Opinion of Superior Court), (R., 31, 32). The insurance carrier may not lawfully agree to render compensation in case of injury, accept a premium or premiums therefor, and not be estopped to set up as a defense to an award against it that the Act under which they had agreed to act is unconstitutional. The question once decided by the local Court does not essentially involve a constitutional question. It was purely a local question.

III. Recent prior decisions of this Court squarely govern this case in favor of appellee:

Grant Smith-Porter Co. v. Rohde (supra);
Miller's Indemnity Underwriters v. Braud, 270 U. S. 59 (1926);
Alaska Packers' Assn. v. Industrial, etc. Commission, 276 U. S. 467 (1928).

It is, therefore, respectfully submitted, that this appeal be dismissed for lack of jurisdiction.

Respectfully submitted,

WILLIAM J. CONLEN,
Attorney for Appellee,
1506 Packard Building,
Philadelphia, Penna.

FILE COPY

DEC 2 1
CHARLES ELMORE

No. 62. October Term, 1929.

IN THE

Supreme Court of the United States

JOHN BAIZLEY IRON WORKS and THE OCEAN ACCIDENT & GUARANTEE CORPORATION, Limited,

Appellants,

v.

ABRAHAM SPAN,

Appellee.

On Appeal from the Supreme Court of the Commonwealth of Pennsylvania.

BRIEF FOR APPELLEE.

WILLIAM J. CONLEN,
Counsel for Appellee.

SAMEL MOYERMAN,
Of Counsel.

International, 236 Chestnut St., Philadelphia

INDEX.

	Page
I. References to Opinions of Pennsylvania Supreme Court and Pennsylvania Superior Court	1
II. Statement of the Case	2
III. Summary of Argument	3
IV. Argument	4
A. Introduction	4
B. Employment Essentially of Local Concern..	6
1. Application of the State Compensation Act Does Not Interfere With the Necessary Uniformity of General Maritime Law in Interstate or Foreign Commerce	6
2. Application of State Compensation Act Does Not Prejudice the Characteristic Features of the Maritime Law	7
3. Analysis of Cases Sustaining Appellee's Position	8
4. Discussion of Cases in Which Maritime Law Applied	16
C. Effect of Statutory Provisions in Pennsylvania Upon the Situation of the Parties, With Special Reference to the Provision Holding an Insurance Carrier Liable Directly to the Employee and Suable Directly by Him, and Effect of Contract of Insurance Carrier as Contract for the Benefit of a Third Person	21
D. Conclusion	28
V. Appendix—Act of May 17, 1921, P. L. 682, Art. VI, Secs. 651, 652	33
VI. Appendix—Opinion, Supreme Court of Tennessee, Nashville Builders Supply Co., *et al.*, v. Bell	34

LIST OF CITATIONS.

A. Cases.

	Page
Alaska Packers Association v. Industrial Accident Commission, *et al.*, 276 U. S. 467 (1928)	12
Anderson v. Carnegie Steel Co., 255 Pa. 33 (1916)	26
Booth Fisheries v. Industrial Com., 271 U. S. 208 (1926)	28
Compagnie Francais v. State Board of Health, 186 U. S. 380 (1902)	5
Cooley v. Board of Wardens, 53 U. S. (12 How.) 299 (1851)	5
Doey v. Howland, 224 N. Y. 30, s. c. 248 U. S. 574 (1918)	19
Employers' Liability Assurance Corp., Ltd., v. Cook, 31 Fed. (2d) 497 (C. C. A. 5th, 1929)	15
Gonsalves v. Morse Dry Dock & Repair Co., 266 U. S. 171 (1924)	18, 19
Grand Lodge v. Meyer, 265 U. S. 30 (1924)	21, 23
Grant Smith-Porter Ship Co. v. Rohde, 257 U. S. 469 (1922)	8, 11, 14
Great Lakes Co. v. Kierejewski, 261 U. S. 479 (1923)	18, 19
Greene County v. Southern Surety Co., 292 Pa. 304 (1928)	22, 26
Huse v. Glover, 119 U. S. 543 (1886)	5
Industrial Accident Com. v. Davis, 259 U. S. 182 (1922)	7
Levan v. Pottstown, Phoenixville Ry. Co., *et al.*, 279 Pa. 381 (1924)	22
Liberato v. Royer, 270 U. S. 535 (1926)	26
London Guarantee & Accident Co., Ltd., v. Industrial Com., *et al.*, 279 U. S. 109 (1929)	18
Lottawanna, 21 Wall. (88 U. S.) 558 (1874)	6
March v. Vulcan Iron Works, 102 N. J. L. 337; s. c. 271 U. S. 682 (1926)	18
Messel v. Foundation Co., 274 U. S. 427 (1927)	18, 19
Miller's Indemnity Underwriters v. Braud, 270 U. S. 59 (1926)	12

LIST OF CITATIONS—Continued.

	Page
Morgans L. & T. R. & S. S. Co. v. Board of Health, 118 U. S. 455 (1886)	5
Nashville Builders Supply Co., *et al.*, v. Bell, 277 U. S. 606 (1928)	15, 28
Northern Coal & Dock Co., *et al.*, v. Strand, *et al.*, 278 U. S. 142 (1928)	18, 23, 27
Packet v. Keokuk, 95 U. S. 80 (1877)	5
Packet Co. v. Catlettsburg, 105 U. S. 559 (1882)	5
Parkersburg & Ohio River Transp. Co. v. Parkersburg, 107 U. S. 691 (1882)	5
Port Richmond and B. P. Ferry Co. v. Board, 234 U. S. 317 (1914)	5
Richard v. Hogarth, 94 Fed. 684 (1899)	25
Richard v. Holman, 123 Fed. 734 (1903)	26
Robertson Co. v. Globe Indemnity Co., 268 Pa. 309 (1920)	22, 26
Robins Dry Dock Co. v. Dahl, 266 U. S. 449 (1925)	18
Rose & Son, Inc., v. Zurich General Accident Co., 296 Pa. 206 (1929)	22
Rosengrant v. Havard, 273 U. S. 664 (1927); s. c. 211 Ala. 605 (1924); s. c. 213 Ala. 202 (1925)	14
Sand v. Manistee River Imp. Co., 123 U. S. 288 (1887)	5
Sherlock v. Alling, 93 U. S. (3 Otto) 99	5
Southern Pacific Co. v. Jensen, 244 U. S. 205 (1917)	18
Southern Surety Co. v. Crawford, 274 S. W. 280; s. c. 270 U. S. 655 (1926)	14
State Industrial Com. v. Nordenholt Corp., 259 U. S. 263 (1922)	11
Steamboat Co. v. Chase, 83 U. S. (16 Wall.) 522 (1873)	5
Steamer St. Lawrence, 1 Black (66 U. S.) 522 (1861)	6, 17
Stewart v. Knickerbocker Ice Co., 253 U. S. 149 (1920)	19
Sultan Ry. Co. v. Dept. of Labor, *et al.*, 277 U. S. 135 (1928)	13
Sweet v. Rechel, 159 U. S. 380 (1895)	24
Union Fish Co. v. Erickson, 248 U. S. 308 (1919)	8, 9

LIST OF CITATIONS—Continued.

Page

United Dredging Co. v. Lindberg, 18 F. (2d) 453; s. c. 274 U. S. 759 (1927) 15
Washington v. Dawson, 264 U. S. 219 (1924) 19
Western Fuel Co. v. Garcia, 257 U. S. 233 (1921) 5
Wilmington Transportation Co. v. Railroad Co., 236 U. S. 151 (1915) 5

B. Statutes.

1. Federal:
   Judicial Code, Section 256, Paragraph 3; Oct. 6, 1917, 40 Stat. 395, c. 97, Sec. 2 ..... 19, 20
2. Pennsylvania:
   Act of June 2, 1915, P. L. 736, Art. III, Sections 301, 302(a) 5
   Act of April 7, 1921, P. L. 114, No. 67, Sec. 1 ..... 5, 24
   Act of May 17, 1921, P. L. 682, Art. VI, Sections 651, 652 ..... 2, 5, 21, 24

C. Other Authority.

Anson: Contracts: 3d Amer. Ed. (1919) 26

IN THE

Supreme Court of the United States.

No. 62. October Term, 1929.

JOHN BAIZLEY IRON WORKS AND THE OCEAN ACCIDENT & GUARANTEE CORPORATION, LIMITED,

Appellants,

v.

ABRAHAM SPAN,

Appellee.

BRIEF FOR APPELLEE

I. REFERENCES TO OPINIONS OF PENNSYLVANIA SUPREME COURT AND PENNSYLVANIA SUPERIOR COURT.

The opinion of the Supreme Court of the Commonwealth of Pennsylvania, is printed on pages 20 to 37, inclusive, in the transcript of record, and is reported sub nom. Span v. John Baizley Iron Works, *et al.*, in 295 Pa. St. 18 (144 Atl. 753).

The opinion of the Superior Court whose judgment was affirmed by the State Supreme Court, appears on pp. 16 to 19, inclusive of the transcript of the record and will be found reported sub nom. Span v. Accident & Guarantee Corporation, in 92 Pa. Super. Ct. 418.

II. STATEMENT OF THE CASE.

On the day of the accident, and just before the accident, Appellee had been at work in the boiler shop of the John Baizley Iron Works (R., 4), by which he was employed as a blacksmith helper (R., 3, 8). Late in the afternoon (R., 5), he was injured on board a ship in navigable waters, while painting angle irons (R., 2, 7, 8). The injury was to his eyes and was caused by sparks which flew from an acetylene torch in the hands of a fellow workman (R., 5, 8). The Compensation Referee found that the ship "steamed into Philadelphia" and that it was "out of commerce" (R., 8), and "that on January 13, 1926, The Ocean Accident & Guarantee Corporation, Ltd., was the compensation insurance carrier of the Defendant, and they have agreed to pay for the Defendant to the Claimant any compensation that may be found to be due arising out of these proceedings" (R., 9).

The Pennsylvania Insurance Code of May 17, 1921, P. L. 682, Art. VI, Sec. 651, provides that the agreement of the insurance carrier to pay awards, "shall be construed to be a direct promise to the injured employe or to the dependents of the deceased employe having a claim under the act, and shall be enforceable by action brought in the name of such injured employe or in the name of such dependents." Section 652 of the Act provides that suit on the policy by the carrier for premiums, shall not be maintained on a policy "which violates any of the provisions of this act."

III. SUMMARY OF ARGUMENT.

The facts of this case indicate that the question involved is one of local concern. The application of the Pennsylvania Workmen's Compensation Act is constitutional, because it does not interfere with the necessary uniformity of the maritime law in its interstate or foreign commerce aspects, or prejudice any of the characteristic features of the maritime law, because the employment was not maritime in character, the parties to the contract of employment are not shown to have had maritime law in contemplation, nor does the situation warrant the inference that they had, and the record does not sufficiently indicate a situation where the maritime law should be applied.

The opinion of the state court should be upheld, because the Pennsylvania Act is voluntary, and specifically provides that the insurance carrier's policy of insurance shall contain a covenant that it will pay any award made directly to the employee; and the carrier is made primarily liable to the employee; and the employee given a right of action directly against it; and it has not been clearly shown that the opinion of the Supreme Court violates the provisions of the Constitution on which the Appellant relies.

IV. ARGUMENT.

A. Introduction.

At the outset of the argument, the Appellee desires to point out the absence of certain facts on the record in this case, which have heretofore appeared before this Court in dealing with the question here involved.

1. The record contains nothing to indicate that Appellee was a marine repairman, employed to work as such, or that he regularly so spent even part of his time, or that he had ever before worked as a marine repairman, other than what inference may be drawn from the fact that at the time of the injury, he was painting angle irons on the "Bald Hill". In short, there is nothing to *show that the contract of employment contemplated any work of a maritime nature,* or repair to any instrumentality of commerce.

2. Nothing to indicate the character of the business conducted by John Baizley Iron Works, or that it generally engaged in repairing ships, or in work of a maritime nature.

3. Nothing to indicate the type, size or use of the ship, "Bald Hill", on which the injury occurred, or that it was engaged in foreign or domestic commerce, other than such inference as may be drawn from the fact that the "Bald Hill" had "Steamed into Philadelphia for necessary repairs" (R., 19).

The Court's attention is specifically called to that provision in the Act of Pennsylvania which provides that the employee may sue in his own name directly against the insurance carrier, and the further provision that the agreement of insurance of the carrier shall be construed to be a direct promise to such injured employee to pay any award given, and to the provision that no suit for premiums may be brought on a policy violating the provisions of the Act

(Act of May 7, 1921, P. L. 682; Art. VI, Sec. 651, 652) (Appendix, p. 33).

The policy in this case was, at no stage of the proceedings, produced by the Appellant. The Workmen's Compensation Act of Pennsylvania is a voluntary one,[1] and under it the employer may contribute to the state fund or privately insure, at his election;[2] but if he privately insure, as in this case, the insurance carrier is directly responsible to the employee. The Referee in this case made an award against the insurance carrier, and no judgment was entered against the employer. It was the insurance carrier which filed the appeal to the Common Pleas Court, on which judgment was entered, and the insurance carrier which filed the appeal to the Superior Court (opinion of Superior Court (R., 17)), on which the appeal to the State Supreme Court was based. The insurance carrier inserted the name of the iron works in its appeal to the Superior Court (R., 17), which the Superior Court, in its opinion, stated was surplusage (R., 17).

We will now merely advert to the well-established doctrine that the admiralty clause does not preclude state laws affecting matters of local concern, although pertaining to maritime affairs.[2a]

---

[1] Act of June 2, 1915, P. L. 736, Art. III, Sec. 301, 302 (a).

[2] Act of April 7, 1921, P. L. 114, No. 67, Sec. 1.

[2a] State pilotage laws held applicable to a vessel entering a harbor: *Cooley v. Board of Wardens*, 53 U. S. (12 How.) 299 (1851). Vessel held subject to state and local inspection and quarantine laws; *Morgans L. & T. R. & S. S. Co. v. Board of Health*, 118 U. S. 455 (1886); *Compagnie Francais v. State Board of Health*, 186 U. S. 380 (1902).

A state law giving a right of action for a wrongful death is enforceable even though death is occasioned from occurrences on navigable water, if the suit is brought in a state court: *Steamboat Co. v. Chase*, 83 U. S. (16 Wall.) 522 (1873); *Sherlock v. Alling*, 93 U. S. (3 Otto) 99; or if the suit is brought in a federal court: *Western Fuel Co. v. Garcia*, 257 U. S. 233 (1921).

A state may regulate the rates charged for carriage on a navigable stream; on state improved waterways: *Sand v. Manistee River Imp. Co.*, 123 U. S. 288 (1887); *Huse v. Glover*, 119 U. S. 543 (1886); between two points in a state when the voyage between them is on the sea: *Wilmington Transportation Co. v. The Railroad Co.*, 236 U. S. 151 (1915); or ferriage from one state to another: *Port Richmond and B. P. Ferry Co. v. Board*, 234 U. S. 317 (1914).

Municipal regulation of wharfage charges permitted: *Packet v. Keokuk*, 95 U. S. 80 (1877); *Packet Co. v. Catlettsburg*, 105 U. S. 559 (1882); *Parkersburg & Ohio River Transp. Co. v. Parkersburg*, 107 U. S. 691 (1882).

Two tests of constitutionality of state regulation in matters of maritime concern, have been applied by this Court:

First, that the state statute must not interfere with the necessary uniformity of the general maritime law in its relation to interstate or foreign commerce.

Secondly, must not prejudice the characteristic features of the maritime law; but from the earliest times, this Court has said that in fixing the boundary of admiralty jurisdiction, the test is a "reasonable and just" construction of the words used in the Constitution, taken in connection with the whole instrument, and the purpose for which admiralty and maritime jurisdiction was granted to the Federal Courts.

The Steamer St. Lawrence, 1 Black (66 U. S.) 522 (1861).

And in dealing with another phase of the question, this Court has said that the guiding principle shall be the fixing of the boundary on "just and logical grounds".

Lottawanna, 21 Wallace (88 U. S.) 558 (1874).

The appellee's position is, that the opinion of the State Supreme Court should be supported, because it is based upon "just and logical grounds", and is a "reasonable and just" construction of the words in the Constitution, and does not interfere with the necessary uniformity of the general maritime law in interstate or foreign commerce, and does not prejudice the characteristic features of the maritime law.

B. Employment Essentially of Local Concern.

1. The Application of the State Compensation Act Does Not Interfere With the Necessary Uniformity of General Maritime Law in Interstate or Foreign Commerce.

In this case, there is nothing of record to indicate that interstate or foreign commerce is involved. It nowhere

affirmatively appears of record either that the owner of the ship or the ship itself, was either before or at the time of or thereafter, engaged in interstate or foreign commerce, or was an instrumentality of such commerce.

Moreover, the repair of an instrumentality of interstate commerce withdrawn for repairs does not constitute work done in interstate commerce and a compensation act of a state applies to an employee engaged in such repair.

Industrial Accident Com. v. Davis, 259 U. S. 182 (1922).

The suit is on a contract, which in no way relates to interstate or foreign commerce. It is a suit to enforce a statutory liability, on an insurance policy which the state statute requires shall contain an actual covenant to pay the award.

2. The Application of the State Compensation Act Does Not Prejudice the Characteristic Features of the Maritime Law.

But if we regard the contract of employment as the contract involved, rather than the contract of the insurance carrier, the question remains whether an employee, a mechanic who hires as a blacksmith's helper, and works in the boiler shop of an iron works, and who, during a day's employment, happens to be sent on board ship to paint angle irons, and is injured while so doing, is entitled to compensation, when his contract of employment is not shown to contemplate work having to do with commerce in any way, or any maritime activity, and one wherein nothing appears to show that either employer or employee was generally engaged in industry of any maritime sort whatsoever, save such work as was being done at the time of injury, and, for aught that appears, the work being done by the mechanic could have been done on land. (See Comments of Supreme Court of Pennsylvania (R., 24, 34, 35, 36).)

When employment is in connection with essentially maritime industry, and both employer and employee are regularly so engaged, the maritime law may govern the situation, but no such facts here appear.

The reasoning of cases dealing with the application of Workmen's Compensation Laws to injuries occurring on navigable waters, indicates that this Court, in viewing the situation of the parties and the law properly applicable, has considered the presence or absence of facts disclosing whether the parties contemplated the maritime law as the basis of their rights and liabilities, or whether the business was closely connected with maritime matters as of importance in reaching a conclusion. In support of this view, we will first discuss those cases in which compensation acts have been held applicable, and will then discuss those cases upon which appellant relies, and will further develop the application of prior rulings to the facts involved in the case at bar.

3. Analysis of Cases Sustaining Appellee's Position.

In *Grant Smith-Porter Ship Co. v. Rohde*, 257 U. S. 469 (1922), it was held that a state compensation statute *abrogated* the right of recovery in admiralty for injuries sustained as the result of tort on navigable waters while at work on a launched but incompleted vessel. There the situation was precisely that in the case at bar, save that the vessel in the Rohde case was uncompleted. The Court said (p. 476):

> " . . . as both parties had accepted and proceeded under the statute by making payments to the Industrial Accident Fund, it cannot properly be said that *they consciously contracted with each other in contemplation of the general system of maritime law.*[3] *Union Fish Co. v. Erickson, 248 U. S. 308.* Under such circumstances regulation of the rights, obligations and consequent liabilities of the parties, as between themselves, by a local rule would not necessarily work material prejudice to

[3] All italics ours unless otherwise indicated.

any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations."

But in the case of the Union Fish Co. v. Erickson, 248 U. S. 308 (1919), unlike the situation in the case at bar, and unlike the situation in the Grant Smith-Porter Ship Company v. Rohde case (*supra*), the object of the employment was distinctly work as a seaman. The services to be rendered under the contract were services as master of the vessel, and the Court said (p. 313):

> "In entering into this contract the parties contemplated no services in California. They were making an engagement for the services of the master of the vessel, the duties to be performed in the waters of Alaska, mainly upon the sea. The maritime law controlled in this respect, and was not subject to limitation because the particular engagement happened to be made in California. *The parties must be presumed to have had in contemplation the system of maritime law under which it was made.*"

And the contract was held enforceable, although the defense tendered was, that it was a contract made in California, and since made there, was governed by the California Statute of Frauds, which required a written agreement for a contract for services extending beyond a year.

In the case at bar, the parties "contemplated" employment in Pennsylvania and contracted with that law in view, as appears from their situation disclosed by the record.

Counsel for appellant seeks to distinguish the Rohde case on the ground that a contract to repair a vessel is within admiralty jurisdiction, whereas a contract to construct a vessel is not within the jurisdiction of admiralty, and reason that therefore, the compensation agreement may not be enforced in the instant case, although it was enforced in the Rohde case. But the contract here in question is not a contract to build or repair a ship; *it is either the contract of employment between employer and employee*, or, as we shall

hereafter maintain, it is really the contract made as required by the act between the employee and insurance carrier.

Regarding the contract involved at this stage of the argument as the contract of employment, the question should be regarded in the light of the incidents of that contract of employment, it being a contract calling for work which does not involve commerce, and on the facts of this case, one not prejudicing any uniformity of the maritime law.

The contract of employment was that of a mechanic to render services to an *iron works* (R. 3), the services being as a blacksmith's helper (R. 3), and to an iron works not shown to be engaged in maritime work.

Appellant also seeks to distinguish the Rohde case on the ground that in that case, the parties contributed to the industrial accident fund, whereas in the case at bar, the employer, instead of contributing to the industrial accident fund of Pennsylvania, as permitted by state statute, made compensation arrangements with a private insurance carrier. Appellant states (p. 51) of the Rohde case that "the parties were clearly within the terms of the statute, because the contract was non-maritime, and they were consciously within its terms because each of them had contributed to the industrial accident fund".

May we not at this stage with propriety ask thequestion, whether, assuming first that the contract of employment is the one involved, a mechanic who contracts to act as blacksmith's helper in an iron works, and his employer, instead of contributing to a state accident fund, as in the Rohde case, takes out insurance in a form and manner permitted by the act in lieu of contribution to the state fund, are not clearly within the terms of the statute, because their contract is distinctly non-maritime? Surely, a blacksmith's helper, in making his contract with an employer, cannot be said to contemplate marine work of any character whatsoever, especially, when it is not shown that the contract did not call for work of a marine character, and the employer was not shown to be generally engaged in maritime work. The par-

ties are consciously within the terms of the compensation act from either aspect of the situation, whether we have in view the contract of employment or the contract of insurance. If contribution to a state accident fund implies a consciousness of the statute, can the employer say that he is unconscious of the statute, because instead of contributing to the fund, he places insurance as permitted by the statute, in lieu of his contribution; or, can an insurance carrier who makes a direct promise as required by the statute, to an employee, under which statute he must covenant to be primarily liable to the employee, and suable directly by the employee, be said to be not consciously within the terms of the act.

This position of the appellant seems to be that when one contributes to a state accident fund, one is conscious of the statute, but when one enters into a contract with a private carrier for compensation to employees, the contract is made in total unconsciousness of the statute, and when one accepts a premium under an act which requires an agreement to pay an award, one is just as unconscious of the act as he is of the award.

In subsequent cases, now to be discussed, this Court has repeatedly interpreted the Rohde case as holding a state compensation law applicable when the situation of the parties is such that the state law must have been regarded by them as the basis of their rights and liabilities.

Thus, in *State Industrial Comm.* v. *Nordenholt Corp., et al.*, 259 U. S. 263 (1922), the Court in speaking of the Rohde case, said (p. 275):

> "The Oregon Workmen's Compensation Law prescribed an exclusive remedy, and the question presented was whether to give it effect would work material prejudice to the general maritime law. The accident occurred on navigable wa.ers and the cause was of a kind ordinarily within the admiralty jurisdiction. Neither the general employment contracted for nor the workman's activities at the time had any direct relation to navigation or commerce—it was essentially a local matter."

The result in the Rohde case *as this Court has said* in the above quotation, was reached by regarding the general incidents of the contract of employment, and not because a contract to build a ship is non-maritime.

In *Miller's Indemnity Underwriters* v. *Braud*, 270 U. S. 59 (1926), recovery under a state compensation statute, was permitted to the representatives of a diver drowned in navigable waters while at work on the river bed in removing abandoned ways which had become a menace to navigation. Making a waterway readily navigable is as important to navigation as the ships themselves, but the matter was regarded from the viewpoint of the situation of the parties and the contract between them and under those circumstances, recovery of compensation permitted.

The Court said (at pp. 64 and 65):

> "The record discloses *facts* sufficient *to show a maritime* tort to which the general admiralty jurisdiction would extend save for the provisions of the state Compensation Act; but the matter is of mere local concern and its regulation by the State will work no material prejudice to any characteristic feature of the general maritime law. The act prescribes the only remedy; its exclusive features abrogate the right to resort to the admiralty court which otherwise would exist."

Thus in *Alaska Packers Association* v. *Industrial Accident Commission, et al.*, 276 U. S. 467 (1928), recovery of compensation under a state statute was permitted even to a seaman. The facts were stated by this Court (at p. 468):

> "Petitioner (employer) is a California corporation engaged in the business of taking fish in Alaska and canning them at its factory located in that Territory. Peterson (employee) resided in California. Within that State he entered into a contract with the Association, whereby he agreed to go to Alaska as a seaman on its bark "Star of Iceland" and, after arriving at the cannery, to go ashore and act there as directed—'any-

thing I was told to do'. Among other things, he made nets, fixed up the small boats always kept there, took them out, and served as a fisherman on one of them."

This Court assumed that the injury was such as was within admiralty jurisdiction, but held the state act applicable.

The *general* incidents of the contract of employment were considered, the Court saying (at p. 469):

> "Peterson (employee) was not employed merely to work on the bark or the fishing boat. He also undertook to perform services as directed on land in connection with the canning operations. When injured certainly he was not engaged in any work so directly connected with navigation and commerce that to permit the rights of the parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law. The work was really local in character."

That part of employment in which the employee acted as a seaman was maritime in character, but the Court, as stated in the opinion, looked to the *general* incidents of the employment in deciding that the contract of compensation was enforceable, because the *general* work contracted for was not directly connected with commerce, and such were the situation and terms of employment of the appellee in the case at bar.

The same rule was reiterated in the *Sultan Ry. Co.* v. *Department of Labor, et al.*, 277 U. S. 135 (1928), wherein the Court said (p. 137):

> "It is settled by our decisions that where the employment, although maritime in character, pertains to local matters, having only an incidental relation to navigation and commerce, the rights, obligations and liabilities of the parties, as between themselves, may be regulated by local rules, which do not work material prejudice to the characteristic features of the general maritime law or interfere with its uniformity."

In the last two cases discussed the Court assumed the work to be maritime, but held the compensation act applicable. Grant Smith-Porter Co. v. Rohde (*supra*) is therefore not distinguishable from the instant case on the ground that in that case the work was done on an incompleted vessel, the contract to build a vessel being not maritime, because as to maritime matters local in character, a state act may apply. In the case at bar, it is not shown that maritime employment was contemplated or that the parties were generally engaged in maritime employment.

In *Rosengrant* v. *Havard,* 273 U. S. 664 (1927)—(The facts of this case are reported in 211 Ala. 605; 100 So. 897 (1924), and 213 Ala. 202; 104 So. 409 (1925)), compensation was sought by the representatives of a deceased employee who at the time of his death was engaged in tallying and grading lumber being unloaded from a barge. Lashed to the barge was a schooner on which the decedent was performing his work. A tugboat was standing by to tow away the barge when unloaded. The employee was accidentally killed by a bullet from a pistol in the hands of a member of the crew of the tug. The judgment of the state court sustaining an award of compensation was affirmed in a memorandum decision of this Court.

Here is a situation in which the employee was acting as a stevedore, but the Court evidently regarded his contract of employment as one not contemplating any regular maritime pursuit and *considered* the fact that the work on navigable waterways was not *regularly* incident to his employment.

Several cases in which this court has refused certiorari were cases in which the employee at the time of the injury was doing work of a maritime character but the court, regarding the *general* incidents of the contract of employment and its relation to commerce, held the compensation act applicable.

Southern Surety Co. v. *Crawford,* 274 S. W. 280; (Cert. denied, 270 U. S. 655 (1926));

United Dredging Co. v. *Lindberg,* 18 Fed. (2) 453; (Cert. denied, 274 U. S. 759 (1927));
Nashville Builders' Supply, et al., not reported; (Cert. denied, 277 U. S. 606 (1928)).

The facts in this latter case are so clearly in line with the facts in the case at bar, and the decision of the Court proceeds so closely on the line of the reasoning in appellee's argument herein under point "C" *infra,* that the appellee calls the Court's attention especially to this case, and because it is not reported, has secured a certified copy of the opinion of the Supreme Court of the State of Tennessee, and attached the opinion in toto to this brief in the appendix (p. 34).

In *Employers' Liability Assurance Corp., Ltd.,* v. *Cook,* 31 Fed. (2) 497 (C. C. A. 5th), (*Petition for certiorari to this court granted October 21, 1929, No. 81, October Term, 1929*), the employee in an assembling plant was killed while unloading cargo from a vessel in navigable waters. Only once previously had he been used in unloading vessels. The court held the compensation act of the state applicable, stating (p. 498 of opinion):

> "The injury to the employee in the case at bar was not caused by a tort; it was a pure accident. Appellee could obtain no relief in admiralty, and has none, unless it be under the Texas Workmen's Compensation Law. We are of the opinion that the state statute applies under the peculiar facts of this case. As in the Rohde case, *the employee and employer did not contract in contemplation of the maritime law. The employee's work was to be done on land.* It was only because he was directed to do so that he ever went aboard the ship. . . . The work he did in unloading the "Lake Gorian" on her two trips to Houston was so infrequent ,and occupied so small a part of his time, as to be merely *incidental* to his regular employment."

In the case at bar it is not even shown that the appellee had ever before worked on a vessel upon a navigable waterway. Such work as he was doing at the time of injury was at most "incidental to his regular employment", *i.e.*, a blacksmith's helper in a boiler shop. It was work not contemplated by the parties at the time of hiring and work in which the employee was not regularly engaged.

To hold the maritime law applicable to the employment because the injury occurred on navigable waters would disturb the incidents of employment as expected and as intended by the parties.

Even if the work involved is of a maritime nature, a state compensation act has been held applicable provided the matter is of a local concern, and when it is not shown that either employer or employee are generally engaged in a maritime occupation, the matter is of local concern, and the mere fact that for the one time when the injury occurred some work was done on navigable waters cannot in line with prior decisions of this court make the matter aught but one of local concern, nor do cases upon which appellants rely support any other conclusion.

4. Discussion of Cases in Which Maritime Law Applied.

An analysis of the facts and of the reasoning of cases which appellant cites as governing this case discloses that in those cases the situation, business and employment of the parties were of a nature much closer to commerce and maritime engagements than that of the parties in the case at bar, and further that in most of the cases the question before the court was whether an admiralty court had jurisdiction and not whether compensation under a state might have been obtained had it been sought. Such cases differ not only in kind but in degree from the case at bar.

But before analyzing these cases appellee will discuss the significance of the point that many cases merely hold that an admiralty court has jurisdiction of the subject matter, and this holding in no way touches upon the question

of whether the compensation act may govern the rights and liabilities of the parties.

In the words of this court (p. 526):

"There is a wide difference between the power of a court upon a question of jurisdiction and its authority over its mode of proceeding and process": *The Steamer St. Lawrence* v. *Black*, cited at p. 6, *supra*.

The importance of this distinction is made manifest in *Grant Smith-Porter Co.* v. *Rohde* (*supra*, p. 8), in which case, as above stated (p. 8), a carpenter was injured while at work on a launched but uncompleted and uncommissioned vessel lying in navigable waters within the state of Oregon. The injured carpenter brought proceedings in Admiralty against his employer in personam alleging injuries caused by the employer's negligence. There was in effect a compensation statute of the optional type by which the act applied unless rejected by either party. Neither employer nor employee had rejected the act. Two questions were certified to this Court. 1. "Is there jurisdiction in admiralty because the alleged tort occurred on navigable waters? 2. Is libellant entitled because of his injury to proceed in admiralty against respondent for the damages suffered?" To which certified questions the court answered (pp. 477-478 of opinion), "Construing the first question as meaning to inquire whether the general admiralty jurisdiction extends to a proceeding to recover damages resulting from a tort committed on a vessel in process of construction when lying on navigable waters within a State, we answer, yes.

"Assuming the second question presents the inquiry whether in the circumstances stated the exclusive features of the Oregon Workmen's Compensation Act would apply and abrogate the right to recover damages in an admiralty court which otherwise would exist, we also answer, yes."

The Court distinctly recognized that admiralty had jurisdiction over matters occurring on navigable waterways,

but distinctly held that the right of recovery might be abrogated even when jurisdiction was present.

We will now merely outline the facts of cases relied upon by appellant in order to indicate the presence of facts distinguishing the case at bar.

In *Southern Pacific Steamship Co.* v. *Jensen,* 244 U. S. 205 (1917), the employer was a common carrier by water.

In *Great Lakes Co.* v. *Kierejewski,* 261 U. S. 479 (1923), the employer operated tugs and scows and maintained a shipyard.

In *Gonsalves* v. *Morse Dry Dock & Repair Co.,* 266 U. S. 171 (1924), the employer operated and maintained a floating dry dock for the repair of steamers.

In *Messel* v. *Foundation Co.,* 274 U. S. 427 (1927), the employer was engaged in business as "a ship builder and repairer of sea-going steamships" and the employee was engaged to work in such business.

In *London Guarantee & Accident Co., Ltd.,* v. *Industrial Commission, et als.,* 279 U. S. 109 (1929), the employer was engaged in the operation of steamships and the employee was employed to work as a seaman on board the ships.

In *Robins Dry Dock* v. *Dahl,* 266 U. S. 449 (1925), no question of a workmen's compensation act was presented to the court by either party. The record (R., 15 of that case) discloses that the employer was engaged in the operation of a dry dock and that the employee was employed to work as a shipyard worker.

In *Northern Coal & Dock Co.* v. *Strand,* 278 U. S. 142 (1928), the employer was regularly engaged in the operation of a dock and unloading boats therefrom and the terms of employee's employment "contemplated that he should work both upon the land and upon the water" and the employee *regularly* performed stevedore service.

In *March* v. *Vulcan Iron Works,* 102 N. J. L. 337 (1926), certiorari denied 271 U. S. 682 (1926), (cited in appellant's brief, pp. 20, 27, 56, 63), the employer "maintained a float-

ing dry dock" and the employee's duties "were to inspect boilers on vessels."

Both these facts clearly indicate a situation having maritime work in contemplation, and scarcely warrant appellant citing the case four separate times in its brief, as being of importance to a consideration of such facts as appear in the case at bar.

In *Doey* v. *Howland,* 224 N. Y. 30 (1918), certiorari denied 248 U. S. 574 (1918), the employee was employed to repair a vessel the repair of which the employer had undertaken.

In *Stewart* v. *Knickerbocker Ice Co.,* 253 U. S. 149 (1920) and *Washington* v. *Dawson,* 264 U. S. 219 (1924), the questions presented were the constitutionality of acts of Congress and in the former case the employee was regularly engaged as a bargeman and in the latter the business of both employer and employee was stevedoring on navigable waters.

Furthermore in some of the above cases, the sole question before the court was the jurisdiction of an admiralty court. In *Gonsalves* v. *Morse Dry Dock & Repair Co.* (*supra*), the question was whether an admiralty court had jurisdiction of an injury occurring in a floating dry dock. That the question of jurisdiction was the only question before the court is apparent from the manner in which the case arose, by appeal directly from the District Court to this court.

In *Great Lakes Co.* v. *Kierejewski* (*supra,* p. 18), the court stated that the sole question was "whether the District Court rightly held that it had jurisdiction to entertain the libel".

In *Messel* v. *Foundation Co.* (*supra,* p. 18), the only question before the court (R., 4, 5 and 6 of that case) was the correctness of the holding of the State Court that the State Court was without jurisdiction to entertain an action for injuries occurring on navigable waters. In view of the "saving clause" of the Judicial Code (Sec. 256, par. 3; Oct.

6, 1917, 40 Stat. 395, c. 97, Sec. 2) the decision of the State Court was clearly erroneous.

In contrast to the facts in the above cases disclosing the general maritime business of the employer, that the employee was engaged to work in a shipyard, in a dry dock, as a ship repairer, or as a stevedore, and had so done over a period of time and that the employer operated a dry dock, a ship repair yards, boats or acted as a stevedore, appellee again calls attention to the record in the case at bar wherein there appears:

(1) Nothing to indicate either that appellee was a marine repairman, employed to work as such, or that he regularly so spent even part of his time, or that he had ever before worked as a marine repairman, other than what inference may be drawn from the fact that at the time of the injury, he was painting angle irons on the "Bald Hill".

In short, there is nothing to *show that the contract of employment contemplated any work of a martime nature,* or repair to any instrumentality of commerce.

(2) Nothing to indicate the character of the business conducted by John Baizley Iron Works, or that it generally engaged in repairing ships, or in work of maritime nature.

(3) Nothing to indicate the type, size or use of the ship, "Bald Hill", on which the injury occurred, or that it was engaged in foreign or domestic commerce, other than such inference as may be drawn from the fact that the "Bald Hill" had "steamed into Philadelphia for necessary repairs" (R., 19).

The employment of appellee on navigable waters at the time of injury was casual and temporary, a mere and *unusual* incident of his usual work on land. (See Comments of Supreme Court of Pennsylvania (R., 24, 34, 35, 36).)

C. Effect of Statutory Provisions in Pennsylvania Upon the Situation of the Parties, With Special Reference to the Provision Holding an Insurance Carrier Liable Directly to the Employee and Suable Directly by Him, and Effect of Contract of Insurance Carrier as Contract for the Benefit of a Third Person.

We come now to a consideration of that portion of appellant's argument discussed under appellant's third division of Point "A", as summarized on page 6 of appellant's brief and amplified in his argument on page 24.

At the outset we may say that we are in general in agreement with the appellant in the summary as outlined by him.

We agree that the principle of uniformity in admiralty and maritime matters has been consistently adhered to by the court. We agree that the doctrine remains unimpaired and should so remain; and we are in accord with the appellant with reference to the point, which will herein be argued, that the effect of the provisions of the various statutes of Pennsylvania and the decisions thereunder upon the insurance carrier is the question of law under consideration, having in view at all times, however, the decisions of this court to the effect that it will follow the law of the state on a question of state law, and especially the state court's construction of a state statute.

Grand Lodge v. *Meyer*, 265 U. S. 30 (1924).

With this latter point always in view, we now approach the question of the effect upon the insurance carrier of that provision of the Act of May 17, 1921 (cited *supra*, p. 2) (Appendix, p. 33), requiring the insurance carrier to pay directly to the injured employee; holding that his obligation to do so shall not be affected by any default of the insured; and that such agreement shall be construed to be a direct promise by the carrier to the employee; and gives a right of action to the employee in his own name against the carrier.

That this doctrine is the law in Pennsylvania has been settled: *Levan* v. *Pottstown & Phœnixville Ry. Co. et al.*, 279 Pa. 381 (1924); and before and after this decision by the highest court of the State of Pennsylvania, it was held by that court that where a contract was made for the benefit of a third person, and a right of action was specifically given such third person by state law, the third person could sue directly upon the promise with the same effect as if the contract had been made specifically and directly with him: *Robertson Co.* v. *Globe Indemnity Co.*, 268 Pa. 309 (1920); *Greene County* v. *Southern Surety Co.*, 292 Pa. 304 (1928).

And the Pennsylvania Supreme Court has likewise held that under a policy of insurance, the beneficiary may sue the carrier directly as a third-party beneficiary, where the policy contains a clause giving a right of action against the Company, by the injured claimant, in case of the bankruptcy of the insured (*A. Rose & Son, Inc., to use,* v. *Zurich General Accident, etc., Co., 296 Penna. 206 (1929)*), and that this should be so is based on sound reasoning, because whether the contract entered into by the insurance carrier is called automobile insurance or life insurance or workmen's compensation insurance, or, even designated by the generic term "insurance policy", a contract is at all times meant, and a proper interpretation of this contract requires the court to merely examine the terms of the contract in the light of the situation of the parties, and if the contract by its terms provides, as does the contract in the case at bar, for payment to a third person, it is to be regarded as a simple promise made to that third person, and the sole question before the court is—Does the contract contain the promise and will the enforcement of that promise against the insurance carrier here deprive it of any protection as to it afforded by any doctrine of constitutional law, relating to the admiralty clause of the Constitution.

It cannot be too strongly urged upon the Court that no just and logical construction points to that contract as having in any wise to do with maritime affairs.

In this connection it may not be amiss to again call the Court's attention to the fact that the Referee found as a fact (R. 9) that the insurance carrier "agreed" to pay the award and that the State law required that this be done in the policy and provided that whether done or not, the policy would be construed as containing that promise.

In making this statement we have not lost sight of that portion of the opinion of Mr. Justice McReynolds in the case of *Northern Coal & Dock Co. et al.* v. *Strand et al.* (*supra*) which appears on page 145: "And it is enough here to say that the State had no power to impose upon an employer liabilities of that kind in respect of men engaged to perform the work of stevedores on ship board"; but, in that case the Court was dealing specifically with the liabilities of the employer who engaged men to perform the work of stevedores on ship board. The Court itself points out that there was nothing in the record to indicate that the Dock Company actually agreed to subject itself to the State Act, and as a reference to the record in that case will indicate, the point was not raised.

In the case at bar, however, not only was both the contract of the employer and the insurance company made with reference to the Act, but, it was made directly thereunder, and therefore the appellee urges the view upon this Court that, the carrier being required by the Act to covenant in his policy to be directly responsible to the employee and suable by him; the Act providing that "Such agreements shall be construed to be a direct promise to the injured employe . . . and shall be enforceable by action brought in the name of such injured employe . . ."[4] we contend therefore that, under such circumstances, particularly with reference to the facts in this case, the carrier, appellant here, is bound by the decision of the State Court, and certainly as to him this Court will follow the ruling of the State Court in a construction of its own statute.

Grand Lodge v. *Meyer* (*supra*).

---

[4] Appendix, p. 33.

It is to be borne in mind that the Act itself indicates the public policy of the State and that in order to make that public policy the more effective, it has, in permitting an employer in lieu of contribution to the state fund for the benefit of state citizens, permitted the employer to insure his liability [5] on the condition that at the same time the carrier who undertakes to so insure the employer shall undertake to separately covenant in his policy with the employee, the engagement of the insurance carrier to pay directly to the employee and to be suable by the employee. (Appendix p. 33.)

Appellant urges that even under these circumstances the insurance carrier is only liable to the employee to the extent to which the employer is liable.

Assuming that this position is correct, we answer that since the highest court of the state has held that that liability exists, the matter being one of local concern, this court is bound on the doctrine of applying the State law to State statutes, to hold the insurance carrier liable because the State law provides that he shall be so liable to the employee and liable as on a direct promise, as the State law requires that such policy shall contain his agreement to be so bound, and it nowhere appears that his policy did not contain such a promise and the Pennsylvania Courts have held that he is liable not only under the State law, but under the State statutes; the ruling of the State Court under the facts in the case not only not being palpably unconstitutional, but, as we think we have demonstrated, not involving, as to the carrier, any question of constitutionality whatsoever.

Sweet v. *Rechel*, 159 U. S. 380, 392, 393 (1894).

The appellee, however, goes further than this and urges upon this court the view that the insurance carrier is liable to the employee upon his direct promise to the employee and to hold him so liable, can under no consideration of the

[5] Act of April 7, 1901, P. L. 114, No. 69, Sec. 1.

case be regarded as other than a local matter and not in any wise affecting the uniformity of the maritime law.

We ask the question—How or why can it be said that maritime law is affected when a State court under a State statute holds an insurance carrier responsible to pay an award to an employee with whom he has separately contracted and actually agreed, either in his policy, as required by the Act, or, under the obligation which the State law enacts shall be conclusively presumed as to him to pay the employee the amount of the award as if there was an actual covenant by the carrier to do so.

Does the enforcement by the highest court of a state of an obligation against an insurance carrier affect the uniformity of the maritime law; does the carrier bear any relation to the maritime law; is it engaged in maritime affairs; will such a holding in any wise affect other maritime matters; and what rule of the maritime law will be impinged upon by such a holding?

These are questions which lie at the threshold of the argument, and to which the appellee finds no answer other than the one that the maritime law is in no wise involved.

It is familiar law in the Federal Courts, for example, that although a charter party is a maritime contract and subject to interpretation by admiralty courts, and the parties thereto governed by the rules of the admiralty law, yet, if in that contract there exists, as there always does exist, a covenant upon the part of either the owner of the ship or the charterer of the ship, with the broker effecting the charter party for the payment of commission, the Federal Court in admiralty will not have jurisdiction of a suit by the broker regarding his commission, although the broker may sue for his commission at law, using the charter party as evidence of the contract, and the courts regard that separate covenant in the contract as one made with a third party for his benefit and governed exclusively by common law.

Richard v. *Hogarth*, 94 Fed. 684 (D. C. N. J.) (1899);

Richard v. *Holman*, 123 Fed. 734 (D. C. Md.) (1903).

We urge that this is an analogous situation to the case at bar. The insurance carrier covenants actually or by implication under the statute, directly with the employee to pay the compensation awarded, and, as to it, the highest court in the state having held that he was so liable to pay the award, how can he be heard to say in this court that such a holding is unconstitutional because it interferes with the proper harmony and uniformity of maritime law in its international and interstate relations or works material prejudice to the characteristic features of the general maritime law?

When the employee sues it is on the promise made for his benefit and the suit is upon a contract: *Anderson* v. *Carnegie Steel Company*, 255 Pa. 33 (1916); *Liberato* v. *Royer*, 270 U. S. 535 (1926); *Robertson Co.* v. *Globe Indemnity Co.* (*supra*, p. 22); and, *Greene County* v. *Southern Surety Company* (*supra*, p. 22).

It is a contract for the benefit of a third person, and subject to the general rules of law affecting such contracts except as affected by the special Pennsylvania Statutes and Pennsylvania decisions bearing on the point. See generally. Anson: "Contracts", 3d Amer. ed. by Corbin (1919).

The Pennsylvania Supreme Court has said that the beneficiary of an insurance policy should always be permitted recovery on the policy as a third party beneficiary.

Rose & Son, Inc., v. *Zurich General Accident Co.* (*supra*, p. 22).

We are dealing in the case at bar with the right of the employee and not with any liability of the employer, we are dealing with the Pennsylvania law and with two persons who have made a contract, solely with the state law in view. We are not dealing with the constitutional right of the state

to subject the employer to the Compensation Act. The insurance carrier is permitted by the state to carry compensation insurance, only provided it make the separate agreement for the benefit of the employee. The requirement is soundly based upon a good social policy under an enactment within the police power of the Commonwealth and indicating the public policy of the Commonwealth and in arriving at the liability of the insurance carrier, the ordinary law of insurance has no effect upon the obligations of the parties, if it in any wise diminishes or renders nugatory the provisions of the special act with reference to which the insurance carrier made his contract. He received premiums under that act insured under that act, and, with a view not only to the act but to the decisions thereunder.

We submit that this is not a matter of legal philosophy and legal theory, as appellant, on page 13 of his brief, would seem to indicate; that it is not an attack upon the ruling in the Jensen Case, nor an attempt to evade or circumvent the doctrine of uniformity; nor can it be said to have its origin in the jealousy or ignorance of the State Court as appellant in his brief would imply.

The appellant has stated in subdivision 2 of Point "B" of his Summary (page 7), that the terms of the *general contract* of employment between the parties are unimportant. If he means by this that the important term in the contract in the case at bar is the implied term between the carrier of insurance and the employee, we are in accord. If he means, however, to thus subtly bring himself within the language used by Mr. Justice McReynolds on page 145 of the report of the case of *Northern Coal & Dock Co.* v. *Strand* (*supra*, p. 18), to the effect that nothing appeared in the record showing that the Dock Company in contracting with the stevedores *actually agreed* to subject itself to the liabilities imposed by the State Compensation Act, we answer that this case clearly shows that the parties (The Ocean Accident & Guarantee Corporation, appellant, and Abraham Span, appellee) actually agreed, as under the

Workmen's Compensation Act they are required to agree,—the appellee that he would have a right of action directly against the appellant, and the appellant that such a right of action would exist and that it, the appellant, would pay the compensation awarded.

That there was an actual agreement was directly found by the Referee, "That on January 13, 1926 (the date of the accident) the Ocean Accident & Guarantee Corporation, Ltd., was the insurance carrier of the defendant, and they have agreed to pay for the defendant to the claimant any compensation that may be found to be due arising out of these proceedings" (R., 9).[6]

At this point again, the appellee desires to call special attention to the reasoning of the Supreme Court of Tennessee in the case of the *Nashville Builders Supply Co., et al. (certiorari denied), 277 U. S. 606 (1928)*, the opinion being set out in toto in the appendix (p. 34).

D. Conclusion.

A considerable portion of appellant's brief is spent in a discussion to the effect that this Court has consistently adhered to the principle of Southern Pacific Co. v. Jensen, but the question here presented is not whether that principle shall be adhered to, but whether that principle shall be widened and extended to a situation in which never before has a workmen's compensation act been held inapplicable, and to a situation so clearly a subject of local concern.

In determining the applicability of the state compensation law to an injury occurring in navigable waters, two requirements have been declared by this Court as necessary of fulfillment that the state act apply. The first requirement is that the compensation act must not interfere with the necessary uniformity of the general maritime law in

[6] Having made such an agreement to insure the injured employee, the insurance carrier is estopped from setting up that the employer, a third party, could not constitutionally be required to render compensation to its employees.

Booth Fisheries Co. v. Industrial Com., 271 U. S. 208 (1926).

interstate or foreign commerce, and second, that the state act must not prejudice the characteristic features of the maritime law.

We have examined the first of these tests, and showed that no question of interstate or foreign commerce is concerned, and that therefore, there is no interference with maritime law in interstate or foreign commerce.

The question presented is, then, whether the application of the Pennsylvania Workmen's Compensation Act in the case at bar, will be prejudicial to the characteristic features of the maritime law.

The appellee has particularly called attention to the record in this case, a record which shows that appellee, for the one time that the injury occurred, happened to be doing work on navigable waters, work not part of his regular employment. We have adverted to the rule of constitutional construction that no state act will be declared unconstitutional unless it clearly and palpably appears unconstitutional, and that state legislation is presumed constitutional.

To hold the state compensation act inapplicable because the party happened to venture on navigable waters, will disturb the relations of the parties as contemplated in their contract of employment. It will disturb the social policy of the state as deemed by the state most suited for the needs of its industrial workers.

Viewed from the aspect of maritime law, to hold the compensation act inapplicable merely because the appellee ventured on navigable waters, cannot prejudice the characteristic features of the maritime law. Maritime law aims at a uniform treatment of, and prescribes the law applicable to maritime workers and maritime employers. The appellee in this case is not shown to be a maritime worker, and his employer is not shown to be generally engaged in maritime pursuits. Under such circumstances, there is no policy of maritime law which has for its object the protection of employer and employee in the case at bar.

In matters of local concern, a compensation act may

apply even if the employment is maritime, and the employment of appellee and his employer, if maritime, is of local concern, because the general and usual occupation of both is not showed to be in connection with matters of an admiralty or maritime nature.

Appellee has further emphasized the fact that the contract on which suit is brought, and the only contract properly before the Court in this case, is the contract of appellant insurance carrier to render compensation in accordance with the Act of Pennsylvania which gives the employee a direct and primary right against the insurance carrier, and that the Referee made an express finding that the appellant was *the* insurance carrier and had agreed to pay any compensation found due. Such being the contract, and there being no judgment against the employer, the question is one of the liability of the insurance carrier and no question of the liability of the employer or what compensation an employer might have been required to render is involved in the case.

To hold an insurance carrier which has agreed to render compensation under a state act liable on his covenant, cannot prejudice any of the characteristic features of the maritime law. The enforcement of such a contract does not involve any relation cognizable under maritime law, or any relation for which uniform maritime laws are desirable. Requiring payment of the compensation in accordance with the agreement does not impair or impinge upon any rule where uniformity is essential.

The situation of the parties to this record is a matter of insufficient concern to the Nation to compel a holding that the enforcement of the compensation award to appellee is unconstitutional, there being involved no need of a uniform rule, and no commerce between the states or with foreign nations. The matter is one of local concern best regulated by state or community action, rather than by national law.

A reversal of the Pennsylvania Supreme Court will do violence to the doctrines that the ruling of a State court will

not be disturbed unless palpably unconstitutional, and that the Supreme Court, certainly in a case involving a contract, will construe the contract in accordance with State law.

Wherefore, it is respectfully submitted that the judgment of the Supreme Court of the Commonwealth of Pennsylvania be affirmed.

Respectfully Submitted,

WILLIAM J. CONLEN,
Counsel for Appellee.

SAMUEL MOYERMAN,
Of Counsel.

APPENDIX—ACT OF MAY 17, 1921, P. L. 682, ART. VI, SEC. 651.

Every policy of insurance against liability under "The Workmen's Compensation Act of nineteen hundred and fifteen", and acts amendatory thereof, shall contain the agreement of the insurer to pay all compensation and provide all medical, surgical, and hospital attendance for which the insured employer may become liable under the act during the term of such insurance, and the further agreement that, as between the insurer and any claimant under the act, notice to the employer or the employer's knowledge of an accident or injury constituting the basis of a claim under the act shall be notice to and knowledge of the insurer. Such agreements shall be construed to be a direct promise to the injured employe or to the dependents of a deceased employe having a claim under the act, and shall be enforceable by action brought in the name of such injured employe or in the name of such dependents. Such obligation shall not be affected by any default of the insured, after the accident, in the payment of premiums or in the giving of any notices required by such policy or otherwise.

Act of May 17, 1921, P. L. 682, Art. VI, Sec. 652.

No suit shall be maintained for the collection of premiums upon any policy of insurance under "The Workmen's Compensation Act of nineteen hundred and fifteen," or acts amendatory thereof, which violates any of the provisions of this act.

APPENDIX—OPINION, SUPREME COURT OF TENNESSEE.

(Filed January 21, 1928.)

David S. Lansden, Clerk.

December Term, 1926.

NASHVILLE BUILDERS SUPPLY COMPANY and AETNA LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT,
Plaintiffs-in-Error,
v.
MRS. ARZIE BELL,
Defendant-in-Error.

Davidson Law.

This case was instituted by the petition of Mrs. Arzie Bell, in her own behalf and for her three children, as the widow and dependent children of W. E. Bell, to recover compensation for the death of W. E. Bell, under the provisions of the Workmen's Compensation Law, chapter 123 of the Public Acts of 1919.

The Nashville Builders Supply Company, Incorporated, was Bell's employer, and the Aetna Life Insurance Company, its co-defendant, had issued a policy of insurance, requiring it to pay to the employees of the Nashville Builders Supply Company, or to their dependents, in case of their death by accident, whatever compensation they should be entitled to receive from their employer under the provisions of said statute; the policy of insurance containing the provisions required by section 45 of the Workmen's Compensation Statute.

Bell met his death by drowning in the Cumberland River, a navigable stream, when the steam dredge boat, on which he was asleep, turned over. Recovery of compensation is resisted on the ground that Bell's contract of employment was maritime in its nature, and that his death was

maritime, with the result that the rights of the parties cannot be affected or controlled by the statutes of the State of Tennessee, but must be measured exclusively by the provisions of the general maritime law of the United States.

The Circuit Court of Davidson County found for the petitioner, and from the judgment of that court the plaintiffs in error have prosecuted their appeal in the nature of a writ of error.

At the time of Bell's death, May 18, 1925, and prior thereto, the Nashville Builders Supply Company was engaged in the business of dealing in building materials, including sand and gravel, with its place of business located in Nashville, Davidson County, Tennessee. All of its business was done with customers located in or near the City of Nashville, and no part of its business was interstate. None of its operations extended beyond the limits of the State of Tennessee. As a part of its business the company procured sand and gravel from the Cumberland River by means of a dredge and barges. It owned a dredge boat, operated by steam, which was employed both in the actual work of dredging, and in towing the empty barges from the company's wharf to the point or points where the sand and gravel were obtained, and in towing the barges filled with sand and gravel back to the company's wharf. This boat was used exclusively for the handling of the sand and gravel, and Bell was employed by the company to take charge of the boat and control its operations in loading the sand and gravel and bringing it to the company's wharf.

In addition to Bell eight men were employed in the operation of the boat and the work of dredging. Bell held a pilot's license, but the operation of the boat was of such a character that a captain was not required. The company permitted Bell to use his own judgment as to the points from which sand and gravel should be secured, and at the time of the accident the officers of the company did not know the point to which the boat was being carried.

This boat, in charge of Bell, left Nashville on the afternoon of the day mentioned, and about 6:30 p. m. had reached a point twelve miles from Nashville, by water, and about six to seven miles by land. At this point, which was in Davidson County, the boat was moored to the bank for the night.

The President of the company testified that this was done in order that the Federal statutes regulating the number of hours the boat crew could be kept at work, without rest, might not be violated; but a member of the crew, who was present on the boat, testified that the stop was made because the crew was not supposed to run the boat at night. If material, we would be required to accept the latter statement as to the cause of the stop, in reviewing the action of the trial court.

While the boat was moored, as above stated, and after Bell had retired in the pilot house, the boat, for some unexplained cause, turned over about 10:30 at night, and Bell was drowned.

It has already been stated that the Nashville Builders Supply Company, the employer, held an insurance policy, issued by its co-defendant, conditioned, among other things, as required by section 45 of our Workmen's Compensation Statute, chapter 123 of the Public Acts of 1919.

Mr. Richardson, president of the company, a Tennessee Corporation, not only testified that his company carried compensation insurance, but stated further: "I thought I was operating under the Workmen's Compensation." The question calling for this statement was objected to, but the ruling of the trial judge admitting this statement in evidence, has not been assigned as error in this court.

The Workmen's Compensation Statute of Tennessee is not compulsory in its application to employers or employees. It is elective, and either an employer or employee may prevent the application of the statute to the contract of employment by taking designated action at the outset. Consequently it has been uniformly held by this court that an action for compensation, as prescribed by the statute, is not

an action in tort, but is an action on the contract of employment. Scott v. Nashville Bridge Co., 143 Tenn. 86.

By the institution of this suit the widow of Bell, for herself and minor children, is affirming the application of the Workmen's Compensation Statute to Bell's contract of employment; and the employer, through the testimony of its president, has admitted its recognition of the application of the statute to the contract of employment, without protest, until the filing of the defense to this suit. From his failure to indicate the contrary, Bell's assent to the application of the statute will be presumed.

The other plaintiff in error, Aetna Life Insurance Company, has filed in the record a copy of the policy issued by it, from which it appears that in consideration of a premium apportioned to the particular item, the operations of the Builders Supply Company covered by the policy included "dredging—by floating dredges. All operations except rock drilling and blasting."

It thus appearing that both of the plaintiffs in error contracted with and for the benefit of Bell, recognizing and conscious of the application of the Tennessee Compensation Statute to the contract of employment, we would be loath to reach a conclusion denying the benefits of the contract and statute to the dependents of Bell, unless forced to do so by the decisions of the Federal Supreme Court. Principles of common justice and equity require that any doubt as to the application of the statute should be resolved in favor of the petitioners herein.

Article 3, Section 2, of the Constitution of the United States provides that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction."

In Southern Pacific Co. v. Jensen, 244 U. S. 205, 214, the Supreme Court of the United States, dealing with the intention of the framers of the constitution, as expressed in the language used, quoted from the earlier opinion in The Lottawanna, 21 Wall., 558, as follows:

> "One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states."

The Supreme Court, in Southern Pacific Co. v. Jensen, then recognized that the general maritime law may be changed, modified or affected by state legislation; and in defining the limitation of the power of the states the court said:

> "And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself. These purposes are forcefully indicated in the foregoing quotations from The Lottawanna."

Applying the principles indicated in the foregoing quotations, the Supreme Court in Southern Pacific Co. v. Jensen denied the power of a state to apply its compensation statute to the contract of employment of a stevedore, when it appears that the contract was maritime in its nature and that the injuries for which compensation was sought were also maritime; but it further appeared that the injury occurred while the stevedore was working on a steamship operated in interstate commerce between the ports of New York and Galveston, Texas, and the conclusion of the court was that the application of the compensation statute of the

state to foreign ships coming into the ports of a state would destroy "the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the states and with foreign countries would be seriously hampered and impeded."

It may be stated in passing that the decision in the case just referred to was accompanied by elaborate dissenting opinions filed by Justice Holmes and Justice Pitney, in both of which Justice Brandeis and Justice Clarke concurred.

In the case of Grant Smith-Porter Ship Co. v. Rohde, 257 U. S. 466, the application of a Workmen's Compensation Statute of the State of Oregon to a contract of employment between a shipbuilder and his employee was resisted, particularly on the ground that the accident and injury, for which compensation was sought, occurred on board a vessel lying at a dock in a navigable stream. The vessel was being completed at the time of the accident, and the injured employee was working as a carpenter on board. In that case it appears that the employer and not the employee sought to have the state statute applied. The Supreme Court held that an action to recover damages resulting from the tort committed by the employer was within the general admiralty jurisdiction, but also held that under the facts of the case the state compensation act would apply so as to abrogate the right of the injured employee to recover damages in an admiralty court. The court found that both parties to the contract of employment had so proceeded under the state statute as to make it appear that they had not consciously contracted with each other in contemplation of the general system of maritime law, and that, under such circumstances, the subjection of their contractual rights, obligations and liabilities to the provisions of the state statute would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations.

Responding to the certificate and questions of the Circuit Court of Appeals, the court held that the facts of the case established a tort within the admiralty jurisdiction of the United States courts, but that in the stated circumstances "the exclusive features of the Oregon Workmen's Compensation Act would apply and abrogate the right to recover damages in an admiralty court which otherwise would exist."

While the Supreme Court, in Grant Smith-Porter Ship Co. v. Rohde, *supra*, "stressed" the point that the parties consciously contracted with reference to the local statute and not with reference to the general maritime law (Millers' Indemnity Underwriters v. Braud, 270 U. S. 59,), the predicate of the decision of the court was its finding that "the matter was only of local concern, and that to permit the rights and liabilities of the parties to be determined by the local law would not interfere with characteristic features of the general maritime rules." Washington v. Dawson & Co., 264 U. S. 219, 227.

In Millers' Indemnity Underwriters v. Braud, 270 U. S., 59, 70 Law Ed., 470, the Supreme Court applied the principle of the decision in Grant Smith-Porter Ship Co. v. Rohde to the case of an employee of a ship building company who had submerged himself, as a diver, from a floating barge anchored in a navigable stream, for the purpose of sawing off the timbers of an abandoned set of ways, once used for launching ships, which had become an obstruction to navigation; the diver having died of suffocation while thus submerged on account of the failure of the air supply. The Supreme Court again held that the case disclosed "facts sufficient to show a maritime tort to which the general admiralty jurisdiction would extend save for the provisions of the state Compensation Act."

After so stating, the Supreme Court concluded as follows: "but the matter is of mere local concern and its regulation by the state will work no material prejudice to any characteristic feature of the general maritime law. The

act prescribes the only remedy; its exclusive features abrogate the right to resort to the admiralty court which otherwise would exist."

In each of the cases last considered the Supreme Court appears to have made the application of the state statute depend upon the facts of the particular case; and the rule seems to be that the state compensation statute may be applied to an industrial accident constituting a maritime tort within the jurisdiction of the admiralty courts of the United States, whenever the application of the state statute to the particular case is of only local concern and does not work material prejudice to any characteristic feature of the general maritime law or tend to destroy the uniformity of the general maritime law in its application to the intercourse of the states with each other or with foreign states.

The Supreme Court has considered other cases and found them to present "matters which were not of mere local concern, because of their special relation to commerce and navigation," and so beyond the regulatory power of the state. Great Lakes Dredge & Dock Co. v. Kierejewski, 261 U. S. 479; Washington v. Dawson & Co., 264 U. S. 219; Gonsalves v. Morse Dry Dock & Repair Co., 266 U. S. 171; Robins Dry Dock & Repair Co. v. Dahl, 266 U. S. 449; Messel v. Foundation Company (decided May 31, 1927), —— U. S., ——, 71 L. Ed. 836.

We have examined these cases and have failed to find in them a statement of an exact or arbitrary line of demarcation beyond which a state may not go in applying its compensation statute to the facts of a particular case. There is to be found no evidence of an intention on the part of the Supreme Court to depart from the statement in Southern Pacific Co. v. Jensen, 244 U. S. 205, 216, 217: "It would be difficult, if not impossible, to define with exactness how far the general maritime law may be changed, modified or affected by state legislation. That this may be done to some extent cannot be denied."

So we must conclude that the courts are vested with some discretion in determining whether the facts of a particular case present matters of mere local concern, the regulation of which by a state statute of the character here involved will not contravene the essential purpose expressed by an act of Congress, nor work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relation. Southern Pacific Co. v. Jensen, 244 U. S. 205; Washington v. Dawson & Co., 264 U. S. 219; Atlantic Transport Co. v. Imbrovek, 234 U. S. 52.

Southern Surety Company v. Crawford, (Texas Court of Appeals), 274 U. S. 280, was an action on a policy of compensation insurance issued to the employer of a deckhand, who lost his life when a dredge boat on which he was employed was capsized and sunk. At the time of the accident the boat was located in the navigable waters of Galveston Bay, and was actively engaged in the work of dredging the channel as an aid to navigation. The fact that the dredge boat was not equipped with self-propelling machinery, but was towed from place to place, does not seem to be material. It was a vessel, as that term is used in the Acts of Congress, and subject to admiralty jurisdiction. United States Code, title 1, section 3: Seabrook v. Raft of Railroad Cross Ties, 40 Fed. Rep. 596; In re P. Sanford Ross, 196 Fed. Rep. 921.

The Texas Court of Appeals held that the employment of the deckhand sustained "no direct relation to commerce of any sort, being essentially local in character." And after referring to Grant Smith-Porter Ship Co. v. Rohde, *supra*, and State Industrial Commission v. Nordenholt, 259 U. S. 263, the court said:

> "The fact that the dredge was a floating one on navigable waters does not take this casualty out of the operation of the principle applied to these authorities,

because the employment here—that of a deckhand on a non-self-propelled boat engaged in the improvement of a Texas inland harbor channel, even if maritime at all, is yet within their meaning, to be deemed of such a local nature as not to materially affect any rules of the sea whose uniformity is essential, and therefore cognizable by the state courts."

The Texas Court awarded recovery to the plaintiffs, and certiorari was denied by the Supreme Court of the United States. —— U. S. —— 70 L. Ed. 783, 46 Supt. Ct. Rep. 353.

In Travelers' Insurance Company v. Bacon, 30 Ga. App. 728, 119 S. E. 458, the holding of the Georgia Court of Appeals is authority for petitioners herein, as follows:

"Assuming that the contract of employment, under which the duties of the employee were to proceed with the master's boat into navigable waters and there operate the same for 'fish for prawn . . . and shrimp' around the bars, and always in sight of land, for a compensation to be determinable by the size of the catch, and return to shore and deliver the fish by a truck at a designated place, where they are afterwards, by others, prepared for market, and also while on land, taking care of the nets and looking after the boats and tackle, was a maritime contract; and also, assuming that the death of the employee, who was drowned after jumping from the boat for the purpose of extinguishing flames upon his clothing, which had been ignited by an explosion on the boat, which was at the time in a body of water designated as a 'creek', and upon which boat the deceased was employed to fish for prawn around the bars and in inland waterways, never out of sight of land, constituted a maritime tort, it does not appear that the general employment contracted for, nor the work performed by the employee, had any direct relation to navigation or maritime commerce, but was a purely local matter, and, as was held in Grant Smith-Porter Ship Co. v. Rohde, 257 U. S. 469, 42 Sup. Ct. 157, 66 L. Ed. 321, 25 A. L. R. 1008 (decided January 3, 1922); 'Under such circumstances regulation of the right, obligations

and consequent liabilities of the parties, as between themselves, by a local rule, would not necessarily work material prejudice to any characteristic with the proper harmony or uniformity of that law in its international or interstate relations.' "

The case of Lindberg v. Southern Casualty Company, 15 Fed. (2nd), 54, was affirmed by the Circuit Court of Appeals, 18 Fed. (2nd), 453, and certiorari was denied by the Supreme Court, — U. S. — 71 L. Ed. 878. Compensation under a state statute was awarded for the death of an employee on a floating dredge, creating a navigable channel from a lake to a river. Conceding the jurisdiction of admiralty, but for the application of the local statute, the district judge held the matter of local concern and subject to local control, following Southern Surety Company v. Crawford, *supra*, and Millers' Indemnity Underwriters v. Braud, *supra*. However, it would seem that the facts of that case did not present either a maritime contract or a maritime tort, and the case is hardly to be considered as authority here, except in so far as the opinion of the district judge is concerned.

The facts of the case before us do not show the commission of a tort by the employer or his agents. The cause of the accident is not disclaimed, and is subject only to conjecture. The action is purely one of contract, and it seems clear that all the parties, including the insurer, contracted with reference to the local statute, and not with reference to the general maritime rules. To hold otherwise would impute fraud to the insurer in accepting the premium for the item above quoted from the insurance contract. The vessel on which Bell was employed was not engaged in commerce of any kind. Its movement was not interstate, and its activities were purely local in character and of only local concern. It was not engaged in transporting freight or passengers for hire, and the sand and gravel moved by it were only for the employer's account.

We hold, therefore, that the facts of the case show a matter of local concern, subject to state regulation in the particular here involved, and the judgment of the circuit court will be affirmed.

SWIGGART, *J.*

OFFICE OF THE CLERK OF THE SUPREME COURT

For the Middle Division of the State of Tennessee.

I, DAVID S. LANSDEN, Clerk of said court, do hereby certify that the foregoing is a true, perfect and complete copy of the opinion of said Court, pronounced at its December term, 1927, in case of Nash. Bldrs. Sup. Co. *et al.* against Mrs. Arzie Bell as appears of record now on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Court, at office in the Capitol at Nashville, on this, the sixth day of November, 1929.

(SEAL)

DAVID S. LANSDEN, *Clerk.*
By ....., *D. C.*

SUPREME COURT OF THE UNITED STATES.

No. 62.—October Term, 1929.

John Baizley Iron Works and The Ocean Accident and Guarantee Corporation, Ltd., Appellants, vs. Abraham Span. } Appeal from the Supreme Court of the State of Pennsylvania.

[April 14, 1930.]

Mr. Justice McReynolds delivered the opinion of the Court.

By Act of June 2, 1915, P. L. 736, as amended June 26, 1919, P. L. 642, the Pennsylvania Legislature provided for payment of compensation by employers to employees accidentally injured, without regard to fault, created an administrative Board and prescribed procedure for carrying the general plan into effect. The statute declares there shall be a conclusive presumption that both employer and employee accept its provisions unless one of them makes written statement to the contrary. Every employer, liable to pay such compensation, unless exempted by the Board, is required to insure payment in the State Workmen's Insurance Fund or some authorized insurance company.

Purporting to proceed under the statute, Abraham Span—appellee here—made application to the Workmen's Compensation Board for an award against the John Baizley Iron Works on account of accidental injuries. He alleged that while employed by that concern he suffered injury; the accident happened "on ship Bald Hill on Delaware River, Phila., Pa., January 13, 1926" when he was painting angle irons; both his eyes were affected by sparks from an acetylene torch in use by a fellow workman engaged in cutting iron; the business of the employer was "Iron Works" and his occupation "Blacksmith helper."

The matter went to a referee who took evidence, heard the parties, awarded compensation according to the statutory schedule, and directed appellant, The Ocean Accident and Guarantee Company, Ltd., insurer of the Iron Works, to pay the same. Upon successive

appeals this award and judgment were approved by the Compensation Board, Court of Common Pleas, Superior Court, and the Supreme Court of Pennsylvania. For purposes of the appeal to the last, and as permitted by its rule, the parties substituted the following agreed statement of facts for all evidence produced at the hearing before the Referee—

> "The claimant, Abraham Span, was at the time of the injuries in question, on January 13, 1926, a resident of Philade'phia and employed at Philadelphia by the defendant, John Baizley Iron Works. The defendant was engaged in performing certain repairs to the steamship "Bald Hill," at Philadelphia, including inter alia, the painting of the engine room and repairs to the floor of the engine room. The said vessel had prior thereto steamed to Philedalphia for necessary repairs, and at the time of the alleged accident was tied up to Pier 98 South in the Delaware River. The claimant, in the course of his aforesaid employment by the defendant, was painting angle irons in the engine room of the vessel. Sparks from an acetylene torch being used by a fellow employe working near claimant, entered the claimant's eyes and caused the injuries resulting in the alleged disability of the claimant."

The Supreme Court declared: "In our opinion the insurance carrier can be held to only such liabilities as may be imposed on the employer." And it held that when injured, Span "was doing work of a nature which had no direct relation to navigation or commerce."

The Bald Hill had steamed to Philadelphia for necessary repairs. She was a completed vessel, lying in navigable waters; the employer, Iron Works, was engaged in making repairs upon her—painting the engine room and repairing the floor; the claimant went aboard in the course of his employment and was there engaged about the master's business when hurt. Obviously, considering what we have often said, unless the State Workmen's Compensation Act changed or modified the rules of the general maritime law, the rights and liabilities of both the employer and the employee in respect of the latter's injuries were fixed by those rules and any cause arising out of them was within the admiralty jurisdiction.

The insistence in behalf of appellee Span is that when hurt he was doing work of a nature which had no direct relation to naviga-

tion or commerce; and to permit application of the State Workmen's Compensation Act would work no material prejudice to the essential features of the general maritime law as in *Grant Smith-Porter Co.* v. *Rohde,* 257 U. S. 469. But so to hold would conflict with principles which we have often announced. *Great Lakes Dredge & Dock Co.* v. *Kierjewski,* 261 U. S. 479, 480, 481; *Gonsalves* v. *Morse Dry Dock & Repair Co.,* 266 U. S. 171, 172; *Robins Dry Dock Co.* v. *Dahl,* 266 U. S. 449, 457; *Messel* v. *Foundation Co.,* 274 U. S. 427, 434; *Northern Coal & Dock Co.* v. *Strand,* 278 U. S. 142, 144.

What work has direct relation to navigation or commerce must, of course, be determined in view of surrounding circumstances as cases arise.

In *Grant Smith-Porter Co.* v. *Rohde, supra,* claimant when injured was working upon an incompleted vessel—a thing not yet placed into navigation and which had not become an instrumentality of commerce. In *Millers' Indemnity Underwriters* v. *Braud,* 270 U. S. 59, the decedent met his death while cutting off piles driven into the land under navigable water. This had only remote relation to navigation or commerce. *Sultan Ry. Co.* v. *Dept. of Labor,* 277 U. S. 135, 136, 137, had relation to the nature of the occupation of men engaged in logging operations.

Kierjewski was a boiler maker employed by a Dredge Company to perform services as called upon. When hurt he was making repairs upon a scow moored in navigable waters. We held this work had direct relation to navigation and commerce. *Great Lakes Dredge & Dock Co.* v. *Kierjewski, supra.*

In *Gonsalves* v. *Morse Dry Dock & Repair Co., supra,* the injured workman was repairing the shell plates of a steamer then in a floating dock. The "accident did not occur upon land" and we held the rights of the parties must be determined under the maritime law.

Robins Dry Dock & Repair Co. v. *Dahl, supra,* held that as the employee was injured while repairing a completed vessel afloat in navigable waters the rights and liabilities of the parties depended upon the general maritime law and could not be enlarged or impaired by the state statute.

In *Messel* v. *Foundation Co., supra,* the claimant was injured while repairing a vessel afloat on the Mississippi River. We said—"The principles applicable to Messel's recovery, should he have

one, must be limited to those which the admiralty law of the United States prescribes, including the applicable section of the Federal Employers Liability Act, incorporated in the maritime law by Sec. 33, c. 250, 41 Stat. 988, 1007."

See *London Company* v. *Industrial Commission*, 279 U. S. 109.

Repairing a completed ship lying in navigable waters has direct and intimate connection with navigation and commerce as has been often pointed out by this Court.

The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice STONE.

I think the judgment below should be affirmed on the authority of *Rosengrant* v. *Havard*, 273 U. S. 664 (Feb. 28, 1927), which affirmed, without opinion but on the authority of *Grant Smith-Porter Ship Co.* v. *Rohde*, 267 U. S. 469 and *Millers' Indemnity Underwriters* v. *Braud*, 270 U. S. 59, a judgment of the Supreme Court of Alabama, *Ex parte Rosengrant*, 213 Ala. 202, *Ex parte Havard*, 211 Ala. 605. In that case one employed as a lumber inspector by a lumber manufacturer, under a non-maritime contract of employment, was injured in the course of his employment, while temporarily on board a schooner lying in navigable waters near his employer's mill. He was there engaged in checking a cargo of lumber then being discharged from a barge lying nearby, in navigable waters and alongside a wharf. Recovery for this injury under the local compensation law was allowed by the state court, on the ground that the contract of employment had no relation to navigation and was non-maritime. This, like the *Rosengrant* case, seems to differ from *Northern Coal & Dock Co.* v. *Strand*, 278 U. S. 142, in that the employee was not a seaman within the meaning of the Jones Act.

Mr. Justice HOLMES and Mr. Justice BRANDEIS concur.